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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1640

BELL & HOWELL COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

and

LOCAL 399, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Bell & Howell Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on January 30, 1979, enforcing an order of the National Labor Relations Board against Bell & Howell.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, *infra,* pp. A1-A27) is not reported officially at the present time. The Decisions of the National Labor Relations Board are reported

at 213 NLRB 407 (1974) (Appendix B, *infra*, pp. A28-A36), 220 NLRB 881 (1975) (Appendix C, *infra*, pp. A37-A46), and 230 NLRB 420 (1977) (Appendix D, *infra*, pp. A47-A59).

JURISDICTION

The decision of the Court below issued on January 8, 1979. The January 30, 1979 judgment of the Court below is reproduced as Appendix E, *infra*, pp. A60-A61. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED

This case raises the question whether constitutional and statutory considerations require or warrant withholding a certification and bargaining order from a union which engages in pervasive discrimination against women.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the United States Constitution and the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. § 151 *et seq.*) (the "Act"), are set forth in Appendix F, *infra*, pp. A62-A64.

STATEMENT OF THE CASE

The Court of Appeals enforced a Decision and Order of the National Labor Relations Board in which the Board ordered Bell & Howell to bargain with Local 399 of the International Union of Operating Engineers ("Local 399"). Both the Board and the Court rejected Bell & Howell's position that it should not be forced to deal with Local 399, which engages in pervasive discrimination against women in representing stationary engineers throughout the Chicago area.

A. The Facts

On February 20, 1974, five days after Local 399 won a representation election involving a group of Bell & Howell's stationary engineers at its Lincolnwood, Illinois plant, Bell & Howell filed a motion with the Board's Regional Director in Chicago to disqualify Local 399 as collective bargaining representative on the ground that it discriminates against women regarding their employment as stationary engineers in the Chicago area. In support of this motion, Bell & Howell offered evidence showing that:

(1) Local 399 excludes women from membership, as shown by the fact that it has no female officers, no female business representatives and no female members out of its total membership of 4,300;

(2) Local 399 exercises substantial control over opportunities for employment as stationary engineers, and membership in Local 399 is the *sine qua non* to employment as a stationary engineer in the Chicago area. This control exists by virtue of Local 399's 500 labor contracts with Chicago area companies covering 4,300 stationary engineers, by virtue of its president's position as a member of the City of Chicago Board of Examiners for Stationary Engineers, by virtue of its training programs for stationary engineers, and by virtue of its contractual job referral procedure;

(3) Local 399's bylaws on their face discourage women from becoming members because they provide death benefits for widows of deceased male members but not for widowers of deceased female members; and

(4) Local 399's group insurance program on its face discourages women from becoming members because it provides maternity benefits for "dependent wives" of male employees but not for female employees.

Local 399 opposed this motion in general terms but did not contradict any of Bell & Howell's specific allegations. On March 8, 1974, the Regional Director transferred Bell & Howell's motion to the Board, and on September 20, 1974, the Board (Chairman Miller and Member Jenkins, dissenting) issued its Decision and Certification of Representative denying Bell & Howell's motion and certifying Local 399 (App. B, pp. A28-A36).

On October 3, 1974, Local 399 requested Bell & Howell to commence negotiations for a labor contract, and on October 16, 1974, Bell & Howell rejected this request so that it could obtain judicial review of the Board's rulings. Local 399 filed an unfair labor practice charge based on this refusal, and the Board's General Counsel issued a complaint alleging that Bell & Howell was refusing to bargain with Local 399 in violation of Sections 8(a)(1) and (5) of the Act. In its answer to the complaint, Bell & Howell admitted that it declined to enter into negotiations with Local 399, but asserted that it took this action in order to obtain judicial review of the Board's erroneous rulings. Both the General Counsel and Local 399 moved for summary judgment, and, on September 29, 1975, the Board issued a Decision and Order requiring Bell & Howell to bargain with Local 399 (App. C, pp. A37-A46).

On October 10, 1975, Bell & Howell filed its Petition for Review with the United States Court of Appeals for the District of Columbia Circuit, but the Board requested the Court to postpone the appeal process pending the Board's reconsideration of its decision. The Court granted this postponement, and the Board then consolidated this case with three other cases for oral argument.* These cases became the Board's vehicle for reconsidering its approach to allegations of race and sex discrimination in election cases.

* Murcel Manufacturing Corp., 231 NLRB 623 (1977); Handy Andy, Inc., 228 NLRB 447 (1977); Trumbull Asphalt Company, Inc., 230 NLRB 646 (1977).

B. The Board's Supplemental Decision and Order

On June 24, 1977, the Board issued its Supplemental Decision and Order, finding that Bell & Howell violated Sections 8(a)(1) and (5) of the Act by refusing to bargain with Local 399, and ordering Bell & Howell to commence bargaining and take other action (App. D, pp. A47-A59). Three opinions were filed. The majority opinion, filed by Chairman Fanning and Members Penello and Murphy, concluded that relevant constitutional and statutory considerations do not require or warrant withholding either a certification or a bargaining order from a union which discriminates on the basis of race or sex because a certification and a bargaining order do not make the union's discriminatory practices the action of the Federal Government (App. D, pp. A47-A57). Member Walther filed a concurring opinion, expressing his view that allegations of race and sex discrimination should be entertained in "certification test/summary judgment proceedings" only when they are supported by membership restrictions in the union's constitution, bylaws or other written policy statement (App. D, pp. A57-A58). Member Jenkins dissented on the ground that by certifying a union which discriminates on the basis of race or sex, the Board directly participates and assists in the union's discriminatory representation in violation of the Constitution (App. D, pp. A58-A59).

C. The Decision of the Court of Appeals

On January 8, 1979, the Court of Appeals affirmed the Board's decision. Rejecting Bell & Howell's statutory argument, the Court said that the Board has discretion under the Act to withhold certification despite a union's election victory but only "in the most compelling circumstances, when certification would conflict with other significant goals of the Act" (App. A, p. A15). Conceding that the Board has a role in promoting the goal of eradicating employment discrimination, the Court nevertheless concluded that withholding certification would not

substantially further this goal and in any event the Act's post-certification procedures are more effective in achieving this goal (App. A, pp. A15-A20). The Court also rejected Bell & Howell's argument that granting exclusive bargaining representative status to a union that discriminates against women would violate the Fifth Amendment (App. A, p. A20). The Court conceded that certification bestows "significant governmental powers" on a union, and that "passive acquiescence by the Board in union discrimination might well pose serious constitutional questions" (App. A, pp. A21-A22). However, the Court held that the Board does not passively acquiesce in union discrimination in light of the Board's post-certification procedures for redressing such discrimination (App. A, pp. A21-A22).

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts with Decisions of the Eighth and Fifth Circuits

As a result of the decision below, a clear conflict exists between the Court of Appeals for the District of Columbia, on one hand, and the Courts of Appeals for the Eighth and Fifth Circuits, on the other hand, on the question presented by this petition. The Court of Appeals for the District of Columbia specifically acknowledged this conflict in its decision when it referred to the Eighth Circuit's decision in *NLRB* v. *Mansion House Center Management Corp.*, 473 F. 2d 471 (1973), and stated that "we are compelled to disagree" with the conclusion reached in that case (App. A, p. A2, n.1).

In *Mansion House*, the employer defended a refusal to bargain complaint on the ground that the complaining union engaged in pervasive racial discrimination. The Board rejected this defense because, in its view, the supporting statistical evidence presented by the employer was inadequate. The Court of Appeals reversed, holding that the Board's grant of exclusive representative status to a discriminating union makes the Board

"a willing participant in the union's discriminatory practices," and that judicial enforcement of the bargaining order in favor of a discriminating union also "cannot be sanctioned" (473 F. 2d at 473). The Court summarized its holding as follows:

> Federal complicity through recognition of a discriminating union serves not only to condone the discrimination, but in effect legitimizes and perpetuates such invidious practices. Certainly such a degree of federal participation in the maintenance of racially discriminatory practices violates basic constitutional tenets. [473 F.2d at 477]

The decision in this case also conflicts with the Fifth Circuit's decision in *NLRB* v. *Sumter Plywood Corp.*, 535 F. 2d 917 (1976), *cert. denied*, 429 U. S. 1092 (1977). There, although the Court found the employer's proffered evidence of union discrimination inadequate to warrant a hearing, it specifically agreed with the Eighth Circuit's decision in *Mansion House*. As stated by the Court:

> The same considerations giving rise to the union's duty of fair representation support the *Bekins* and *Mansion House* procedures whereby the Board is to consider, at the prompting of an employer's objection, whether a union has shown such a "propensity to fail fairly to represent employees," because of racial discrimination, that the union should not be certified. We agree that this can be a proper issue for the Board to consider in certification proceedings or as an affirmative defense in a refusal to bargain proceeding against an employer. [535 F.2d at 930]

In sum, the Constitution and the Act now have one meaning in the District of Columbia and an opposite meaning in the Eighth and Fifth Circuits. The petition should be granted to resolve this conflict and assure a uniform application of the law regardless of forum.

II. This Case Presents an Important Question of Federal Law Which Should Be Decided by This Court

It is undisputed that exclusive representative status confers upon a union "significant governmental powers" and that a union which exercises these powers in a discriminatory manner runs afoul of the Constitution and the Act (App. A, pp. A21-A22). This case raises an important question of federal law: What is the Board's obligation under the Constitution and the Act to assure that a union does not exercise these powers in a discriminatory manner?

The complexity of this question is reflected not only by the conflict which now exists in the Courts of Appeals, but also by the difficulty which the Board itself experienced in answering it. Initially, the approach of the Board majority was to withhold exclusive representative status from a labor organization which discriminates on the basis of race, alienage, or national origin. *Bekins Moving & Storage Co.*, 211 NLRB 138 (1974). Chairman Miller and Member Jenkins stated their basis for this approach as follows:

> Were we, as an arm of the Federal Government, to confer the benefits of a certification upon a labor organization which is shown to be engaging in a pattern and practice of invidious discrimination, the power of the Federal Government would surely appear to be sanctioning, and indeed furthering, the continued practice of such discrimination, thereby running afoul of the due process clause of the fifth amendment. [footnote omitted] [211 NLRB at 138-39]

The Board retreated from this approach in its initial decision in this case. Member Kennedy, who had concurred with Chairman Miller and Member Jenkins in *Bekins*, took the position that sex discrimination, unlike race, alienage and national origin discrimination, does not have the constitutional significance necessary to warrant the withholding of exclusive representative status. This position prevailed when Member Kennedy concurred with the *Bekins* dissenters to form a new majority.

A change in Board membership brought about a reconsideration of the *Bekins* approach. In his Statement of Position filed in this case and the other consolidated cases, the Board's own General Counsel urged the Board to adhere to its *Bekins* decision on this basis:

> In light of this case authority, it seems clear that if the Board were to grant representative status to a union that practices discrimination, it could be construed as having placed "its power . . . and prestige behind the . . . discrimination" and as having granted "Federal Government benefit and support" to such discrimination. The Constitution clearly forbids this.

Disregarding this advice, the Board overruled *Bekins* in *Handy Andy, supra,* one of the consolidated cases, and adopted the approach which was followed in this case and affirmed by the Court below.

Under the current approach, the Board does not consider itself obligated by the Constitution or the Act to consider evidence of a union's race or sex discrimination until after a bargaining relationship has been established and a charge of unfair representation is filed under Section 8(b) of the Act concerning discrimination in the established bargaining unit. However, Section 8(b) proceedings are not a constitutionally or statutorily adequate remedy in cases like this where pervasive union discrimination completely denies employment to women or minority persons in an entire industry or craft. Since such proceedings are dependent upon a charge being filed with the Board by some outside person, it is unlikely that they would ever be instituted in these cases.

Thus, if a union's discriminatory practices have prevented women and minority persons from even acquiring the skills necessary to qualify them for employment in a craft, they would not relate their failure to be employed in the craft to any specific bargaining unit and therefore would not seek redress under Section 8(b). Moreover, a white male member of the bargaining unit, who in a sense is a beneficiary of the union's

discrimination, would have no personal interest in instituting Section 8(b) proceedings and, in any event, he would hesitate to expose himself to the union and peer pressure which would arise from such a challenge. Finally, while the employer is obviously concerned with union discriminatory practices which exclude women or minority persons from his workforce, he might consider the stability arising out of the established bargaining relationship to outweigh his interest in launching an uncertain and disruptive campaign against the union's discriminatory practices.

In view of the inadequacy of Section 8(b) proceedings as a means for dealing with pervasive union discrimination, the granting of exclusive representative status to a union which engages in such discrimination renders the Board "a party" to the discrimination within the meaning of *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961), or at least raises an important question of federal law which should be decided by this Court.

CONCLUSION

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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April, 1979.

APPENDIX A

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 75-2002

BELL & HOWELL COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

LOCAL 399, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, INTERVENOR

Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

Argued June 19, 1978

Decided January 8, 1979

John P. Jacoby, for petitioner.

Richard B. Bader, Attorney, National Labor Relations Board with whom *John S. Irving*, General Counsel, *Carl L. Taylor*, Associate General Counsel, *Elliott Moore*, Deputy Associate General Counsel and *Marion Griffin*, Attorney, National Labor Relations Board were on the brief, for respondent.

Sheldon M. Charone and *Michael Fanning* were on the brief, for intervenor.

Also *Michael J. Bartlett* entered an appearance for petitioners.

Before: BAZELON, MCGOWAN and ROBB, *Circuit Judges*

Opinion for the Court filed by *Circuit Judge* BAZELON

BAZELON, *Circuit Judge*: Petitioner Bell & Howell Co. (Bell & Howell) challenges an order of the National Labor Relations Board (NLRB) requiring Bell & Howell to bargain with Local 399, Operating Engineers (Local 399) as collective bargaining representative for Bell & Howell's stationary engineers at its Lincolnwood, Illinois facility.

Bell & Howell contends that it is not obligated to bargain with Local 399 because Local 399 allegedly discriminates against women in its membership policy and benefit plans. Bell & Howell also challenges certain evidentiary rulings made by the NLRB in the pre-election inquiry into the appropriateness of the bargaining unit. We affirm the Board's decision that Bell & Howell violated §§ 8(a)(5) and (1) of the Act.[1]

1. In NLRB v. Mansion House Center Management Co., 473 F. 2d 471 (8th Cir. 1973), the court held that an employer may introduce evidence of a union's racially discriminatory policies as a defense to a charge that the employer refused to bargain with the union in violation of § 8(a)(5). The Court, noting the constitutional problems that might arise should the Board make its "remedial machinery" available to a discriminatory union, held that

> the claim of racial discrimination allegedly practiced by a union seeking recognition as a representative bargaining unit under the act is a relevant area of inquiry for the Board when the defense is appropriately raised before the Board upon a company's refusal to bargain.

Id. at 474. For the reasons that appear more fully herein, we are compelled to disagree with that conclusion.

Mansion House, and the Board's response to that decision, has been the subject of considerable interest. *See generally*, Axelrod & Kaufman, *Mansion House—Bekins—Handy Andy: The National Labor Relations Board's Role in Racial Discrimination Cases*, 45 GEO. WASH. L. REV. 675 (1977); Leslie, *Governmental Action and Standing: NLRB Certification of Discriminatory Unions*, 1974 ARIZ. ST. L. J. 35; Meltzer, *The National Labor Relations Act and Racial Discrimination: The More Remedies the Better?*, 42 U. CHI.

(Footnote continued on next page.)

I. BACKGROUND

On April 25, 1973, Local 399 petitioned the NLRB for a representation election for Bell & Howell's stationary engineers at Lincolnwood. The NLRB held hearings before a hearing officer to determine the appropriateness of the unit. During the course of that proceeding Bell & Howell sought production of Local 399's labor contracts and records of jurisdictional disputes involving Local 399.[2] These documents were necessary, in Bell

(Footnote continued from preceding page.)

L. REV. 1 (1974); Note, *The Impact of De Facto Discrimination By Unions of the Availability of NLRB Bargaining Orders*, 47 S. CAL. L. REV. 1353 (1974); Comment, 7 GA. L. REV. 770 (1973); Comment, 58 MINN. L. REV. 335 (1973).

2. Specifically, Bell & Howell subpoened the following information:

1. Copies of all collective bargaining agreements to which Local 399 of the International Union of Operating Engineers ("IUOE") (including its Branch Locals 399B and 399C) is a party on the date of the issuance of this subpoena or has been a party during the five-year period prior to the date of the issuance of this subpoena.
2. Copies of all petitions for representation elections filed by Local 399 of the IUOE (including its Branch Locals 399B and 399C) with the National Labor Relations Board during the five-year period prior to the date of the issuance of this subpoena.
3. Copies of all agreements, except for agreements described in Item 1 above, pursuant to or under which an employer recognized Local 399 of the IUOE (including its Branch Locals 399B and 399C) as the collective bargaining representative for said employer's employees during the five-year period prior to the issuance of this subpoena.
4. Copies of all letters, correspondence, memoranda or other documents or records containing or relating to demands by Local 399 of the IUOE (including its Branch Locals 399B and 399C) for recognition as the collective bargaining representative for an employer's employees during the five-year period prior to the date of the issuance of this subpoena.
5. Copies of all letters, correspondence, memoranda or other documents or records relating to claims, during the ten-year period prior to the date of the issuance of this subpoena,

(Footnote continued on next page.)

(Footnote continued from preceding page.)

that work should be or should have been assigned to employees represented by Local 399 of the IUOE (including its Branch Locals 399B and 399C) rather than to other employees, or that work should be or should have been assigned to other employees rather than to employees represented by Local 399 of the IUOE (including its Branch Locals 399B and 399C).

6. Copies of all letters, correspondence, memoranda or other documents or records relating to strikes during the ten-year period prior to the date of the issuance of this subpoena, involving members of Local 399 of the IUOE (including its Branch Locals 399B and 399C), or involving other employees at plants or other facilities where Local 399 of the IUOE (including its Branch Locals 399B and 399C) also represented employees at the time of said strikes.
7. Copies of all unfair labor practice charges which have been filed with the National Labor Relations Board against Local 399 of the IUOE (including its Branch Locals 399B and 399C) under Section 8(b)(4)(D) of the National Labor Relations Act during the ten-year period prior to the date of the issuance of this subpoena.
8. Copies of all letters, correspondence, memoranda or other documents or records relating to proceedings before the National Labor Relations Board involving Local 399 of the IUOE (including its Branch Locals 399B and 399C) under Section 10(k) of the National Labor Relations Act during the ten-year period prior to the date of the issuance of this subpoena.
9. Copies of all letters, correspondence, memoranda or other documents or records relating to any joint board, arbitration or other proceedings (except for NLRB proceedings described in item 8 above), during the ten-year period prior to the date of the issuance of this subpoena, involving the adjustment of disputes whether work should be or should have been assigned to employees represented by said Local 399 of the IUOE (including its Branch Locals 399B and 399C) or to other employees.
10. Copies of all letters, correspondence, memoranda or other documents or records relating to apprenticeship, training or education programs which have been in effect during the five-year period prior to the date of the issuance of this subpoena for employees represented by or members of Local 399 of the IUOE (including its Branch Locals 399B and 399C).

Joint Appendix (J. A.) 44-45.

& Howell's view, to shed light on the appropriateness of the unit.[3] At the request of Local 399, the Hearing Officer revoked Bell & Howell's subpoena on the grounds that the request was burdensome and the material irrelevant. Bell & Howell appealed unsuccessfully to the Regional Director, and the hearing then concluded.

After the hearing, Bell & Howell again appealed the evidentiary ruling to the Regional Director, who agreed to a limited reopening of the hearing to consider additional evidence on the appropriateness of the unit.[4] Bell & Howell then reissued the subpoena to Local 399. After much procedural wrangling, Local 399 finally produced ten sample contracts and offered to permit Bell & Howell to examine the remaining documents at Local 399's offices. Although Bell & Howell complains that this constituted "blatant refusal to comply with the subpoena," Br. for Bell & Howell at 8, the Regional Director held that by producing ten contracts and making the remainder available to Bell & Howell, the union had "sufficiently complied" with the subpoena. Joint Appendix (J.A.) 74. The Regional Director found that the stationary engineers were an appropriate unit.

3. Bell & Howell believed these documents were relevant to the Board's *Mallinckrodt* factors. *See* Mallinckrodt Chemical Works, 162 N. L. R. B. 387, 397 (1966). The *Mallinckrodt* factors guide the Board in determining the appropriateness of certifying a craft unit separately from an overall group of production and maintenance employees. They are typically used when a craft group seeks to sever itself from a broader collective bargaining unit that had previously included the craft members, but also may be "useful" when there has been no previous history of collective bargaining. *See* Freemont Hotel, Inc., 168 N. L. R. B. 115, 117 (1967), and § III, *infra*.

4. The record was reopened to permit additional evidence on two of the *Mallinckrodt* factors:

(1) The history, practice and experience of Petitioner in representing the type of employees involved in the unit here petitioned for.

(2) The area and industry practice regarding the representation of the type of employees involved in the unit here petitioned for.

J. A. 48.

On February 11, 1974, the NLRB denied Bell & Howell's request for review of the Regional Director's decision. The election, held on February 15, 1974, resulted in seven votes for Local 399, one against.

On February 20, 1974, Bell & Howell moved to disqualify Local 399 from certification because the union allegedly discriminates against women. While the motion was pending. the NLRB announced its policy toward allegations of union discrimination in representation proceedings in *Bekins Moving & Storage Co.*, 211 N. L. R. B. 138 (1974). In *Bekins*, a plurality of the Board (Chairman Miller and Member Jenkins) suggested that the Board could not constitutionally certify a union engaged in invidious discrimination. *Id.* at 139. The plurality therefore interpreted § 9(c)(1) of the Labor Management Relations Act (LMRA),[5] to require an inquiry into allegations of discrimination before certification but after the union involved actually won an election. The plurality did not enunciate what proof of discrimination would be necessary to disqualify a union, but suggested that not every violation of Title VII would be sufficient grounds for denying certification. The Board left the standards to be worked out in future adjudication.

Member Kennedy concurred in part in the plurality opinion. He would deny certification of a union only when the union discriminated in its *membership policy* on the basis of *race, alienage* or *national origin. Id.* at 145. He would not decline to certify when the complained-of practice was the union's failure to honor its duty of fair representation. *Id.* Members Fanning and Pennello dissented, arguing that the Constitution did not require the Board to consider allegations of discrimination prior to certification, and that the Act, § 9(c)(1), affirmatively forbade consideration of the issue.

Shortly after the decision in *Bekins*, the Board issued its first decision in this case. In *Bell & Howell Co.*, 213 N. L. R. B. 407 (1974), the Board refused to entertain Bell & Howell's allega-

5. 29 U. S. C. § 159(c)(1) (1976).

tions of discrimination. Members Fanning and Pennello (the dissenters in *Bekins*) were joined by member Kennedy, who declined to extend the *Bekins* principle to allegations of discrimination against women. Chairman Miller and Member Jenkins dissented, concluding that Bell & Howell had made out a prima facie case of discrimination under *Bekins* and that the Board should therefore investigate the allegations.

In order to obtain judicial review of the NLRB's decision[6] Bell & Howell refused to bargain with Local 399. Local 399 brought unfair labor practice charges against Bell & Howell, and the Board, relying on its decision in the certification proceeding, ultimately granted summary judgment against the company, and found that the refusal to bargain violated §§ 8(a)(5) and (1) of the Act.[7] Bell & Howell Co., 220 N. L. R. B. 881 (1975).

On December 22, 1975, the NLRB decided *sua sponte* to reconsider its decision in this and three similar cases. On June 24, 1977, the NLRB issued its supplemental decision, affirming its earlier finding that Bell & Howell had violated §§ 8(a)(5) and (1) and ordering Bell & Howell to bargain with Local 399. *Bell & Howell Co.*, 230 N. L. R. B. 420 (1977). In the supplemental decision the Board followed the rationale of *Handy Andy*, 228 N. L. R. B. 447 (1977), which overruled *Bekins*. In *Handy*

6. Ordinarily, a decision to certify a union pursuant to § 9(c)(1) is not reviewable. Boire v. Greyhound Corp., 376 U. S. 473 (1953); McCulloch v. Libbey-Owens-Ford Glass Co., 403 F. 2d 916, 917 (D. C. Cir. 1968), *cert. denied*, 393 U. S. 1016 (1969). An employer can obtain review of the Board's decision by refusing to bargain with the union and challenging the representation decision in an appeal from an unfair labor practice order. *Id.* A limited opportunity for direct review of the representation proceeding may be available under *Leedom v. Kyne*, 358 U. S. 184 (1958), where the Court held that the district court could entertain a challenge to the Board's decision to certify because the Board ignored a mandatory provision of the LMRA, § 9(b)(1).

7. Section 8(a)(5), 29 U. S. C. § 158(a)(5) (1976) provides, *inter alia:* "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees. . . ."

Andy the Board announced it would no longer consider evidence of invidious discrimination by a union prior to certifying the union as a collective bargaining representative. The Board held that it is not constitutionally required to consider such evidence, and further, it is "*not authorized* to withhold certification of a labor organization duly selected by a majority of the unit employees." *Id.* at 448 (emphasis added).

II. The Board's Refusal to Entertain Evidence of Discrimination by Local 399

A. *Employer's Standing to Challenge Union Discrimination*

Initially, we must determine whether Bell & Howell has standing to challenge the Board's certification of Local 399 where the challenge is based on Local 399's alleged discrimination against women.[8] The Board, relying on *Virginian Ry. Co. v. System Federation 40*,[9] contends that an employer lacks standing to assert the constitutional rights of its employees as a defense to the statutory obligation to bargain with the employees' chosen representative.

The economic consequences of a bargaining order to an employer appear sufficient to establish "injury in fact," the element of standing mandated by the case or controversy requirement of Article III.[10] An employer who has been found guilty of an unfair labor practice and has been ordered to bargain is also a "person aggrieved" within the meaning of § 10(f) of the Act.[11] Therefore, the employer is also well within the ambit of the statutory authorization to seek review.[12]

Normally, however, one who properly invokes the jurisdiction of a federal court "has standing to seek redress for injuries done him, but may not seek redress for injuries to others." *Moose Lodge No. 107 v. Irvis*, 407 U. S. 163, 166 (1972).[13]

8. In this opinion we treat interchangeably the question of whether the NLRB may *certify* a discriminatory union and whether the Board may order an employer to *bargain with* a discriminatory union, once that union has been certified. This is appropriate because the obligation to bargain stems from the certification and the certification cannot be challenged except through a refusal to bargain. See note 6 *supra*.

9. 300 U. S. 515 (1937). In *Virginian Railway* the Court held that an employer could not raise the rights of its employees as a defense to the duty to "treat with" a certified collective bargaining representative under § 2(9) of the Railway Labor Act, 45 U. S. C. § 152(9) (1970), *id.* at 558, and that the duty was enforceable by injunction. *Id.* at 549. *See* Leslie, *Governmental Action and Standing: NLRB Certification of Discriminatory Unions*, 1974 Ariz. St. L. J. 35, 38-47.

10. *See* Craig v. Boren, 429 U. S. 190, 194-195 (1976); Sierra Club v. Morton, 405 U. S. 727, 738 (1972); Retail Clerks Union 1059 v. NLRB, 348 F. 2d 369, 370 (D. C. Cir. 1965); Flast v. Cohen, 392 U. S. 83, 99-101 (1968).

> The gist of the question of standing is when the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure the concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."

Id. at 99, quoting Baker v. Carr, 369 U. S. 186, 204 (1962). Standing thus looks to the appropriateness of the party to request adjudication of the issue. This suggests that the question of the employer's standing (in terms of "injury in fact") is inapplicable where the Board has cross-petitioned for enforcement of its order. See 3 K. Davis, Administrative Law Treatise § 22.07 at 236-239. (1958).

11. 29 U. S. C. § 160(f) (1976).

12. The fact that the Board has entered an order against Bell & Howell may in itself be sufficient to confer standing on the employer. "When the Board enters a final order against the charged party, it is clear that the phrase '[a]ny person aggrieved' in § 10(f) enables him to seek immediate review in the appropriate Court of Appeals." U. A. W. Local 283 v. Scofield, 382 U. S. 205, 210 (1965). Certainly an employer meets a second, nonconstitutional standing requirement—that the interest the employer seeks to protect be "arguably within the zone of interests to be protected or regulated by the statute. . . ." Association of Data Processing Service Organizations v. Camp, 397 U. S. 150, 153 (1970); *cf.* Barlow v. Collins, 397 U. S. 159, 167 (Brennan, J., concurring in the result and dissenting).

13. This issue is typically called the right to assert "constitutional *jus tertii*." *See generally*, Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 Yale L. J. 599 (1962); Note, *Standing to Assert Constitutional Jus Tertii*, 88 Harv. L. Rev. 423 (1974).

In challenging Local 399's certification, Bell & Howell did not allege that Local 399's discriminatory policies have or will cause any harm to Bell & Howell (*e.g.*, by preventing Bell & Howell from hiring female stationary engineers or causing Bell & Howell to violate statutes prohibiting discrimination against women.)[14]

The barrier against asserting the rights of third parties does not appear to be rooted in Article III itself, but rather is a prudential doctrine designed to limit unnecessary decisions of constitutional questions.[15] The rule against allowing a party to assert the constitutional rights of third persons has been relaxed in certain situations, particularly where the third party's interest might otherwise go unprotected.[16]

14. In its reply brief to this court Bell & Howell raises for the first time the spectre of "interfer[ence] with [the employer's] ability to satisfy his obligations under the myriad of federal and state equal employment opportunity statutes." Reply Br. for Bell & Howell at 5. Bell & Howell does not specify how certification will interfere with its equal employment obligations, particularly in view of the fact that the union does not control the employer's hiring through an exclusive referral system. *See* Br. for Bell & Howell in case No. 13-RC-13022, filed July 20, 1973 (challenging the hearing officer's rulings). In its original brief, the employer relied on the fact that it was "aggrieved" by the order and urged that since the issue has been "vigorously and cogently argued," the court should not wait for an employee challenge. Br. for Bell & Howell at 29 n. 19, *citing* Craig v. Boren, 429 U. S. at 192-197 in which the Court allowed a vendor to challenge the constitutionality of an Oklahoma law restricting sale of "3.2% beer" to males over 21 but permitting its purchase by females over 18.

15. [L]imitations on a litigant's assertion of jus tertii are not constitutionally mandated, but rather stem form a salutary "rule of self-restraint" designed to minimize unwarranted intervention into controversies where the applicable constitutional questions are ill-defined and speculative. *See, e.g.*, Barrows v. Jackson, 346 U. S. 249, 255, 257 (1953); see also Singleton v. Wulff, 428 U. S. 106, 123-124 (1976) (Powell, J., dissenting).

Craig v. Boren, 429 U. S. at 193.

16. Thus the rule against asserting third party's constitutional rights has been relaxed when those rights would be "diluted or adversely affected" if the constitutional challenge should fail and the

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Whether in this case the interest would otherwise go unprotected depends on precisely how the "interest" at stake is defined. If the interest is in eliminating the union's discriminatory practices, there are alternative means of achieving this goal under both the LMRA (once the union has been certified) and Title VII,[17] and under both provisions the action can be brought by the victim of discrimination. If, on the other hand, the interest is in preventing certification of a discriminatory union, there may be no adequate alternative to allowing the employer to raise the issue. The right of a dissenting unit member, or an individual outside the unit, to intervene in a representation proceeding in order to raise the discrimination issue is questionable.[18] Moreover, even if such an individual could intervene, the nonreviewability of certification decisions might insulate from judicial review any Board decision in favor of the union.[19]

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statute or policy remain in effect pending a challenge by one whose rights are affected. Craig v. Boren, 429 U. S. at 195, *quoting* Griswold v. Connecticut, 381 U. S. 479, 481 (1965).

17. Remedies under the LMRA for breach of the statutory duty of fair representation are discussed at note 33 *infra*. Title VII, 42 U. S. C. § 2000e-2(c) (1976), prohibits a union from discriminating in its membership and prohibits any other form of discrimination that would deprive an employee of employment opportunities or otherwise affect an employee's status. A union that violates these provisions may be enjoined and ordered to take appropriate remedial action. Such suits may be brought by the Equal Employment Opportunity Commission (EEOC) or by a person aggrieved by the union's discriminatory practices. 42 U. S. C. § 2000e-5(f) and (g) (1976).

18. Section 11194.3 of the NLRB Case Handling Manual, Pt. II, Representation Proceedings, Oct. 1975 ("Tests for granting or denying intervention") provides, *inter alia*: "Motions to intervene made by 'employees' or 'employees' committees' not purporting to be labor organizations, should be denied." In contrast, any person may file an unfair labor practice charge. *See* NLRB, Rules & Regulations § 102.9, 29 C. F. R. § 102.9 (1977). The complainant is entitled to participate in the unfair labor practice proceeding as a party. *Id.* § 102.8.

19. We need not decide whether an individual discriminated against by the union could bring an action in district court challenging the certification under Leedom v. Kyne, 358 U. S. 184 (1958). *See* note 6 *supra*.

We think certification in itself is sufficiently important that the constitutionality of the practice announced in *Handy Andy* should not be insulated from review. Our conclusion is reinforced by a concern that if the Board's certification of a discriminatory union violates the Fifth Amendment, then our enforcement of a bargaining order with such a union might equally violate the Fifth Amendment. We are mindful of the Court's observation in *Shelley v. Kraemer*, 334 U. S. 1, 22 (1948): "[t]he Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals." We must therefore decide whether granting enforcement of this bargaining order would deny equal protection to those who are the victims of union discrimination, particularly where those persons might otherwise be precluded from challenging the constitutionality of the order on their own behalf.

We thus conclude that Bell & Howell has standing to raise the constitutional rights of victims of discrimination in this case. Although *Virginian Railway* implies a contrary result, that case was decided prior to a series of cases elaborating the "*jus tertii*" doctrine[20] and also preceded the Supreme Court decisions holding that court enforcement of private discrimination constitutes state action in violation of the Fourteenth Amendment.[21]

20. The origin of the prudential doctrine of *jus tertii* is not altogether clear, but the first significant elaboration was not until Tileston v. Ullman, 318 U. S. 44, 46 (1943). In *Tileston*, the court held that a doctor lacked standing to challenge a Connecticut law prohibiting the use of contraceptives or giving assistance in their use because there was "no basis on which we can say that he has standing to seek an adjudication of his patient's constitutional rights to life which they do not assert on their own behalf." *Id.* *Tileston* may also be read, however, as denying standing to assert *jus tertii* only because the physician himself failed to allege any injury in fact. *See* Note, *supra* note 13 at 430 and n. 44.

Only with Barrows v. Jackson, 346 U. S. 249 (1953), was there an explicit recognition of the prudential nature of the *jus tertii* rule, applicable even where the plaintiff establishes injury in fact. Although the Court in *Barrows* cited Justice Brandeis' elaboration of the "passive virtues" in Ashwander v. T. V. A., 297 U. S. 288, 346-348 (1936) (Brandeis J., concurring), the prudential doctrine of *jus tertii* elaborated in *Barrows* is not included in Justice Brandeis'

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B. *Section 9(c)(1) of the LMRA*

Section 9(c)(1) of the LMRA provides, *inter alia*: "If the Board finds . . . [that] a question of representation exists, it *shall* direct an election by secret ballot and *shall* certify the results thereof."[22] Although, by its terms, § 9(c)(1) is mandatory, the Board may nonetheless deny certification to a victorious union in certain limited circumstances. The Board most often

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exposition. The only discussion of standing to assert *jus tertii* in *Ashwander* is in connection with cases where the plaintiffs alleged no injury in fact. *Id.* at 348.

21. *See, e.g.*, Barrows v. Jackson, 346 U. S. 249 (1953); Shelley v. Kraemer, 334 U. S. 1 (1948); *cf.* Hurd v. Hodge, 334 U. S. 24 (1948). The fact that *Virginian Railway* was cited with apparent approval in *Moose Lodge*, 407 U. S. at 166, does not require a different result, since in *Moose Lodge* there was no barrier to assertion of the constitutional right by one actually discriminated against.

22. 29 U. S. C. § 159(c)(1) (1976) (emphasis added). The provisions of § 9(c)(1) were added by the Taft-Hartley Amendments of 1947, 61 Stat. 143 (1947). The requirement that the Board "shall certify" election results was approved in both the House and Senate versions and was adopted without debate or comment.

Prior to 1947, the Board was given much broader discretion in deciding whether to certify a union on the basis of election results. The Wagner Act, 49 Stat. 453 (1935) provided, *inter alia:*

> Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and *may* take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives. (Emphasis added.)

The decision to hold an election, and to utilize the results of such an election were discretionary with the Board. *See* Inland Empire Council v. Millis, 325 U. S. 697, 706-707 (1945).

exercises this authority to deny certification when the electoral process itself is tainted.[23] The Board may also decline to certify a union that has interests that conflict with those of the employees in the unit the union seeks to represent.[24] These decisions illustrate that the mandatory language of § 9(c)(1) has been, and must be read in harmony with the basic purposes of the LMRA. Where certification would be inconsistent with the dominant purposes of the Act, the Board has the discretion to deny it, despite the union's electoral victory.[25]

Although the statute does not in all cases require certification of a union chosen in an election by a majority of employees, the purpose of §§ 7 & 9 of the LMRA, facilitating employee self-determination, is best served by giving broad effect to employees' choice of a collective bargaining representative. To promote this policy, Congress has given the NLRB authority to conduct elections and to assure the prompt resolution of disputes concerning representation. Congress' concern that representation questions be resolved speedily is reflected prominently

23. Great Atlantic and Pacific Tea Co., 101 NLRB 1118, 1120 (1952). Refusal to certify when there are serious flaws in the electoral process is consistent with the primary purpose of the electoral machinery established by § 9, namely, to determine the true wishes of a majority in the unit. *See* NLRB v. A. J. Tower Co., 329 U. S. 324, 330-31 (1946) (decided under the Wagner Act). In *Handy Andy* the Board recognized that denying certification to a victorious union is appropriate when necessary to protect the Board's processes. 228 N. L. R. B. at 454.

24. R & M Kaufmann v. NLRB, 471 F. 2d 301 (7th Cir. 1972), *cert. denied,* 411 U. S. 906 (1973); NLRB v. David Buttrick Co., 361 F. 2d 300 (1st Cir. 1966). *See* Bausch & Lomb Optical Co., 108 N. L. R. B. 1555 (1954); Bambury Fashions, Inc., 179 N. L. R. B. 447 (1969). *See generally,* Meltzer, *supra* note 1 at 11 n. 58.

25. It is a "familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." Holy Trinity Church v. United States, 143 U. S. 457, 459. That principle has particular application in the construction of labor legislation. . . .

National Woodwork Manufacturers Ass'n v. NLRB, 386 U. S. 612, 619 (1967).

in its decision to limit direct judicial review of the Board's decisions in representation proceedings.[26] Permitting an employer to inject allegations of discrimination into a representation proceeding would tend to undermine this purpose of the Act. Often an employer's allegations will require the Board to conduct extensive investigations.[27] While these inquiries are carried out, the employees' choice of a representative is thwarted, and the delay may prove an effective tactic for eroding the union's support in the unit.[28] Moreover, industrial strife may be exacerbated by inducing unions to forego the Board's electoral machinery in favor of recognitional picketing and other forms of economic pressure.

A refusal to certify a union chosen by a majority in the unit thus can be justified only in the most compelling circumstances, when certification would conflict with other significant goals of the Act. In this case Bell & Howell argues that the vital national commitment to eradicate employment discrimination justifies denying certification to Local 399.

Although other federal agencies have primary responsibilities for carrying out the national anti-discrimination policy, Bell & Howell correctly observes that the Board too has a role in promoting this goal.[29] The Board already implements this policy

26. The legislative history is reviewed in Leedom v. Kyne, 358 U. S. at 191-194 (Brennan, J., dissenting). *See* notes 6 and 19 *supra.*

27. Professor Meltzer observes that claims of discrimination are likely to pose "complex and time consuming issues," because in most instances Title VII has eliminated the more obvious and explicit forms of discrimination, such as discriminatory union constitutions or collective bargaining agreements. Meltzer, *supra* note 1 at 14.

28. *See* Meltzer, *supra* note 1 at 15. *Cf.* M. SOVERN, LEGAL RESTRAINTS OF RACIAL DISCRIMINATION IN EMPLOYMENT, Ch. 6 at 159 (1966).

29. Plainly, national labor policy embodies the principles of nondiscrimination as a matter of highest priority, Alexander v. Gardner-Denver Co., 415 U. S. 36, 47 (1974), and it is a commonplace that we must construe the NLRA in light of the broad national labor policy of which it is a part.

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as an aspect of enforcing the union's statutory duty of fair representation.[30] A union violates its duty of fair representation when it takes advantage of its monopoly position as exclusive bargaining representative to discriminate invidiously against employees or potential employees on the basis of race or sex.[31] Breach of this duty may violate §§ 8(b)(1)(A), b(2) and

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Emporium Capwell Co. v. Western Addition Community Organization, 420 U. S. 50, 66 (1975).

In NAACP v. FPC, 425 U. S. 662, 665 (1976), the Court indicated that an agency's responsibility to carry out the national policy against invidious discrimination must be determined in light of the purposes underlying the creation of the agency. The primary purpose of the LMRA was not, and is not, the eradication of discrimination in employment. *See* Axelrod & Kaufman, *supra* note 1 at 682-688 (discussing legislative history); *compare* Title VII, 42 U. S. C. § 2000e (1976).

However, in prohibiting union discrimination or union induced employer discrimination, the Act clearly reflects a concern that unions not use their power of exclusive representation to shut individuals out of the workplace based upon race or sex. Thus, while not a dominant purpose of the LMRA, the Board's role in combatting union discrimination is far greater than the role assigned to the Federal Power Commission (now the Federal Energy Regulatory Commission).

30. The Court first recognized the statutory duty of fair representation under the Railway Labor Act in Steele v. Louisville & Nashville R. R., 323 U. S. 192 (1944), but the doctrine was soon applied to the NLRB. *See* Wallace Co. v. NLRB, 323 U. S. 248, 255-56 (1944); Syres v. Oil Workers Local 23, 350 U. S. 892 (1956), *rev'g per curiam*, 223 F. 2d 739 (5th Cir. 1955). In its most general terms the duty of fair representation requires an exclusive bargaining representative to bargain in good faith for the interest of all the members of the unit. Humphrey v. Moore, 375 U. S. 335, 342 (1964). *See* H. WELLINGTON, LABOR AND THE LEGAL PROCESS 129-84 (1968); M. SOVERN, *supra* note 28 at 143-75.

31. Syres v. Oil Workers Local 23, 350 U. S. 892 (1955) (racial discrimination); Peterson v. Rath Packing Co., 461 F. 2d 312 (8th Cir. 1972) (sex discrimination).

b(3) of the Act,[32] and subjects the offending union to Board-imposed sanctions[33] as well as private causes of action.[34]

It is by no means certain that the interpretation of the LMRA urged by Bell & Howell would substantially further anti-discrimination goals in a manner consistent with the other policies of the LMRA.[35] First, denying certification or withholding a bargaining order from a discriminatory union may be an ineffective remedy for union discrimination. These sanctions will have no effect on unions that are strong enough to establish collective bargaining relationships with employers without recourse to the Board.

Second, these sanctions are at odds with the remedial focus of the Board's authority.[36] At best, denying certification or with-

32. 29 U. S. C. §§ 158(b)(1)(A), (b)(2) and (b)(3) (1976). *See* Miranda Fuel Co., 140 N. L. R. B. 181, 185-87 (1962), *enforcement denied*, 326 F. 2d 172 (2nd Cir. 1963); Independent Metal Workers (Hughes Tool Co.), 147 N. L. R. B. 1573 (1964). This circuit has held that breach of the duty of fair representation violates § 8(b)(1)(A). Truck Drivers Local 568 v. NLRB, 379 F. 2d 137 (D. C. Cir. 1967); *see also* Local 12, Rubber Workers v. NLRB, 368 F. 2d 12 (5th Cir. 1966), *enforcing* 150 N. L. R. B. 312 (1964), *cert. denied*, 389 U. S. 837 (1967). Employer participation in union discrimination may also be an unfair labor practice. Miranda Fuel Co., 140 N. L. R. B. at 185-186.

33. A union that violates the duty of fair representation may be decertified. Hughes Tool Co., 104 N. L. R. B. 318, 325-29 (1953); Pioneer Bus Co., 140 N. L. R. B. 54-55 (1962); Local 1, Independent Metal Workers (Hughes Tool Co.), 147 N. L. R. B. 1573 (1964). The union may also be subject to a cease and desist order for committing an unfair labor practice. Miranda Fuel Co., 140 N. L. R. B. 181; United Rubber Workers v. NLRB, 368 F. 2d at 24.

34. Vaca v. Sipes, 386 U. S. 171 (1967). In *Vaca* the Court assumed, but did not decide, that breach of the duty of fair representation is an unfair labor practice. *Id.* at 186.

35. Here, as in *Emporium Capwell*, we are asked to interpret the Act to provide "a right to short-circuit orderly, established processes for eliminating discrimination in employment. . . ." 420 U. S. at 70. The efficacy of the proposed remedy is thus relevant to interpreting the statute. *Id.* at 66-69.

36. The Board's powers are remedial, not punitive, and the Board may not justify an order solely on the ground that it will

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holding a bargaining order will prevent future discrimination in the unit that the union seeks to represent. That sanction provides no remedy for those who are already victims of the union's discrimination. Yet, it is well settled that the Board's principal remedial power is to "make whole" employees who have been injured by violations of the LMRA.[37]

Finally, to give the Board responsibility for investigating allegations of past union discrimination that occurred outside the unit for which the union seeks certification would unnecessarily duplicate the functions of the EEOC. The broader scope of the EEOC's investigative and remedial authority, its expertise in detecting subtle and complex forms of discrimination, and its single-purpose anti-discrimination mission combine to make the EEOC a preferable vehicle for eliminating union discrimination.[38]

In contrast to denial of certification before the union becomes exclusive bargaining representative, sanctions based on violations of the duty of fair representation are more likely to be effective in providing a remedy for victims of discrimination, in a manner more consonant with the other underlying policies of the LMRA. The duty of fair representation applies to all exclusive bargaining representatives, not simply to those who use the

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deter future violations of the Act. Republic Steel Co. v. NLRB, 311 U. S. 7, 12 (1940).

> The Board has broad discretion to adapt its remedies to the needs of particular situations so that "the victims of discrimination" may be treated fairly. But the power of the Board "to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act."

Local 60, United Brotherhood of Carpenters v. NLRB, 365 U. S. 651, 655 (1961) (citations omitted).

37. *Republic Steel,* 311 U. S. at 10-12.

38. See Note, *The Impact of De Facto Discrimination, supra* note 1 at 1384-85.

Board's electoral or remedial machinery. Complaints that the union has violated its duty of fair representation are more likely to be brought by the individuals who are the victims of discrimination. This appropriately focuses the Board's inquiry on the union's conduct in a particular bargaining unit, easing the Board's fact-finding activities. When the complaint is brought by a victim of discrimination, the Board can tailor its order to redress specific instances of discrimination, making the victims whole, and, at the same time, providing more protection for the employees' right of self-determination.[39] If remedies for discrimination are imposed only after the collective bargaining relationship is established, the employer cannot use allegations of discrimination as a pretext to frustrate or delay the employees' right to select their representative.

In sum, we conclude that nothing in the LMRA, interpreted in light of the purposes of the Act, requires the NLRB to consider allegations of discrimination prior to certifying a victorious union, at least where the proffered evidence of discrimination

39. As Member Walther observed in Murcel Manufacturing Co., 231 N. L. R. B. No. 80, 97 L. R. R. M. 153, 154 (1977) (one of the companion cases to *Bell & Howell*)

> [A]n 8(b)(1)(A) proceeding allows for the tailoring of a remedy to fit the nature of the discrimination found. The withholding of an otherwise appropriate 8(a)(5) remedial bargaining order is a relatively drastic remedy which completely precludes the establishment of a bargaining relationship. . . .
>
> Proceedings under Section 8(b), on the other hand, offer an opportunity to inject some remedial sensitivity into this area. In many situations a cease-and-desist order coupled with an affirmative make-whole obligation will provide a completely adequate remedy. In cases where the discrimination is more pervasive, a revocation of the union's certification may well be the only appropriate remedy. The point is, however, that this flexibility can only be attained through an 8(b) proceeding.

In *Murcel* the Board declined to entertain allegations of union race and sex discrimination as a defense to a § 8(a)(5) charge against the employer.

relates to past union misconduct outside the bargaining unit that the union seeks to represent.[40]

C. *Constitutional Requirements*

Bell & Howell argues that granting exclusive bargaining representative status to a union that discriminates against women violates the Fifth Amendment, and urges that we interpret the Act to avoid what Bell & Howell views as an unconstitutional result.[41] We reject this argument, concluding that at least under the facts of this case, the Board's decision not to inquire further into Bell & Howell's allegations does not violate the Fifth Amendment.

It is clear that the Fifth Amendment's proscription[42] is not limited to discrimination initiated by the government. Governmental actions which "authorize" or "encourage" private discrimination are equally proscribed. *Reitman v. Mulkey*, 387 U. S. 369, 375-76 (1967). Indeed, where the state is "significantly involved" with invidious discrimination, that discrimination comes within the ban of the Fifth Amendment. *Id.* at 380, *Burton v. Wilmington Parking Authority*, 365 U. S. 715, 722 (1961).

40. In NLRB v. Sumter Plywood, 535 F. 2d 917, 931 (5th Cir. 1976), *cert. denied*, 429 U. S. 1092 (1977) the court indicated that it would deny enforcement of a bargaining order on behalf of an allegedly discriminatory union "only when the employer has proffered specific evidence sufficient to demonstrate a pattern of racially discriminatory behavior by the Union which would support a finding of a *definite propensity* for racially unfair representation." (Emphasis added.) In that case the employer offered evidence of a racially oriented campaign that excluded almost all whites. The Board declined to consider that evidence as a justification for the employer's refusal to bargain. The court affirmed, holding that the employer failed to establish a prima facie case that would warrant a hearing. *See also* NLRB v. Bancroft Manufacturing Co., 516 F. 2d 436, 446-47 (5th Cir. 1975), *cert. denied*, 424 U. S. 914 (1976) (employer not entitled to hearing where the employer offered no evidence of discrimination by the local union in question).

The approach in *Sumter Plywood* is not necessarily inconsistent with that which we adopt today, since we do not decide whether the Board could constitutionally exclude evidence that establishes the union's intention to discriminate *in the future* in the unit for which the union seeks certification. *See* note 46, *infra*.

41. This is the approach adopted by the Eighth Circuit in *Mansion House*. *See* note 1 *supra*.

42. The Fifth Amendment proscribes discrimination at least insofar as the discrimination is "so unjustifiable as to be violative of due process." Bolling v. Sharpe, 347 U. S. 497, 499 (1954). *See* Schneider v. Rusk, 377 U. S. 163, 168 (1964). In light of our

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These same cases establish that the Board's actions here do not constitute authorization or encouragement of discrimination. In *Burton*, the public Parking Authority violated the Fourteenth Amendment *not* by leasing to a restaurant owner who had discriminated in the past, but rather by its failure to "affirmatively require [] [the restaurant] to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation." *Id.* at 725. Moreover, the restaurant owner became bound not to discriminate only *after* he became "significantly involved" with the public Authority.

Here the effect of certification is to achieve precisely what was lacking in *Burton*, the imposition of an affirmative obligation on the private association not to discriminate. Far from authorizing and encouraging discrimination, certification subjects the union to additional sanctions for any future discrimination.[43]

The Board's decision to address claims of discrimination after certification thus seems to accord well with the relevant constitutional considerations. Once certified, a union is invested

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disposition of this case, we have no occasion to decide whether the Fifth Amendment creates a different standard for classifications based on sex than for those based on race, or national origin.

43. These sanctions apply not only to unions that are certified under § 9(c), but more generally to any union that is recognized as an exclusive bargaining representative. *See* TAN 28-32.

with significant governmental powers,[44] and passive acquiescence by the Board in union discrimination might well pose serious constitutional questions. Both the Court and the Board have avoided these difficulties by interpreting the Act to prohibit such discrimination,[45] and by providing a wide variety of sanctions to enforce the prohibition.

Thus, when the only evidence of discrimination proffered is evidence of a union's past discrimination outside the unit in question, the NLRB does not violate the Fifth Amendment by extending certification to the union without an inquiry into the alleged discrimination.[46]

44. "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents." Steele v. Louisville & Nashville R. R. Co., 323 U. S. at 202. Certification provides a union with several benefits in addition to the right to act as the exclusive representative. Under the one year rule the employer is obligated to bargain with the union elected by the unit for one year after the election, during which time no rival union may file for an election in the unit. Brooks v. NLRB, 348 U. S. 96, 104 (1954). The contract bar rule extends the protection against challenges by a rival union for the life of a collective bargaining agreement up to a maximum of three years. General Cable Co., 139 N. L. R. B. 1123 (1962); Deluxe Metal Furniture Co., 121 N. L. R. B. 995, 998-1004 (1958). The Board has indicated that it will deny the benefit of the contract bar rule to a racially discriminating union. Pioneer Bus Co., 140 N. L. R. B. 54, 55 (1962); *cf.* Pittsburgh Plate Glass Co., 111 N. L. R. B. 1210, 1213 (1955). However, this sanction appears applicable only when the unlawful discrimination appears on the face of the contract. *See* St. Louis Cordage Mills, 168 N. L. R. B. 135 (1967).

45. *See* Steele v. Louisville & Nashville R. R., 323 U. S. 192 (1944). *Cf. id.* at 208-09 (Murphy, J., concurring) (concluding that discrimination by a union that is an exclusive bargaining agent would violate the Fifth Amendment).

46. We do not decide at this time whether a different result is required where the union's constitution or by-laws, or explicit conduct in a representation election, establish that the union will discriminate in the unit in question. *See* Handy Andy, 228 N. L. R. B. at 467 (Member Walther, concurring):

> My colleagues in the majority note that "we have and will continue to consider [in a representation proceeding] the impact

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III. Denial of a Fair Hearing

Bell & Howell also contends that certain evidentiary rulings, limiting the company's right to present evidence on the *Mallinckrodt* factors, deprived the company of a fair hearing.[47] The

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> of unlawful discrimination where such consideration is required to preserve the integrity of the Board's own processes." To the instances which they cite, I would add yet another: instances in which it can be established through reference to a petitioner's constitution, bylaws, or other written statement of policy, that the petitioner—not an affiliated organization or sister local—restricts access to membership on the basis of race, alienage, national origin, or sex. Should such discrimination be found, I would disqualify the petitioner from access to our election machinery until it can establish that the offensive practices have been eliminated.

See also Bell & Howell, 230 N. L. R. B. at 424 (Member Walther, concurring).

The Board has left open the possibility that in appropriate cases it can and will consider this evidence, *see* Handy Andy, 228 N. L. R. B. at 454, and nothing in our opinion decides that the NLRB is precluded from considering such evidence. *See* § II, B, *supra.* Bell & Howell has not alleged that the local's by-laws exclude women, nor that the union in its campaign promised to discriminate if selected as exclusive bargaining representative. The only evidence of discrimination cited by Bell & Howell in Local 399's governing instruments is the provision of maternity benefits to "dependent wives" but not "female employees," and the provision of a death benefit to "widows" but not "widowers."

Bell & Howell offered no evidence that "widowers" or "female employees" had or would in fact be denied such benefits discriminatorily (though such a showing would presumably be difficult if in fact the union has no female employees). It may be that the provisions of the benefit plans would be interpreted in a neutral fashion. In any event, the Board provides adequate opportunities to challenge these provisions after certification (as well as through the Civil Rights Act), if the union in fact discriminates in the provision of benefits.

47. Specifically, Bell & Howell objects to

1) The Regional Director's decision to limit the reopened hearing to two of the *Mallinckrodt* factors;

2) The Hearing Officer's limitation of the cross-examination of Local 399's President, Mr. Wren;

(Footnote continued on next page.)

Mallinckrodt factors are primarily concerned with the appropriateness of carving out a unit of craft workers from a previously established, collective bargaining unit.[48] Their relevance is diminished where, as here, there is no previous history of collective bargaining on a broader basis. The Regional Director's decision to reopen the hearing permitted the company to

(Footnote continued from preceding page.)

3) The Regional Director's finding that producing a sample of Local 399's contracts constituted sufficient compliance with Bell & Howell's subpoena.

Taken together, Bell & Howell argues that these rulings prevented it from producing relevant evidence in the representation proceeding and therefore denied it due process.

48. In *Mallinckrodt,* 162 N. L. R. B. at 197, the Board enumerated six factors that it deemed relevant to determining whether a craft unit should be severed from a broader bargaining unit:

> 1. Whether or not the proposed unit consists of a distinct and homogeneous group of skilled journeymen craftsmen performing the functions of their craft on a non repetitive basis, or of employees constituting a functionally distinct department, working in trades or occupations for which a tradition of separate representation exists.
>
> 2. The history of collective bargaining of the employees sought and at the plant involved, and at other plants of the employer, with emphasis on whether the existing patterns of bargaining are productive of stability in labor relations, and whether such stability will be unduly disrupted by the destruction of the existing patterns of representation.
>
> 3. The extent to which the employees in the proposed unit have established and maintained their separate identity during the period of inclusion in a broader unit, and the extent of their participation or lack of participation in the establishment and maintenance of the existing pattern of representation and the prior opportunities, if any, afforded them to obtain separate representation.
>
> 4. The history and pattern of collective bargaining in the industry involved.
>
> 5. The degree of integration of the employer's production processes, including the extent to which the continued normal operation of the production processes is dependent upon the performance of the assigned functions of the employees in the proposed unit.
>
> 6. The qualifications of the union seeking to "carve out" a separate unit, including that Union's experience in representing employees like those involved in the severance action.

present evidence on two of the factors,[49] and the third factor is irrelevant in the absence of a prior history of collective bargaining. Moreover, Bell & Howell has failed to allege or prove any prejudice from the evidentiary rulings. Specifically, Bell & Howell does not allege that Local 399 lacks history, practice and experience in representing employees like those at Lincolnwood, nor that the area and industry practice does not include separate units such as that at Lincolnwood. Rather, the employer offered to prove only that different representation patterns prevail at some locations.[50] The Regional Director also

49. See note 4, *supra.* Bell & Howell also sought to introduce evidence on the second factor listed in *Mallinckrodt, see* note 48, *supra.* That factor is plainly irrelevant where there is no history of bargaining on a broader basis. Bell & Howell implicitly recognizes this fact, and attempts to recast the second factor as "the effect which a separate unit would have on the stability of the employer's industrial relations." J. A. 53. This characterization misconceives the point of the *Mallinckrodt* factors, which are concerned with the harms and benefits of carving out a separate group as that decision affects employees, not employers.

50. 3. The employer believes that the subpoenaed documents, together with the testimony of Petitioner's President, Richard T. Wren, will prove that separate units of the type of employees involved in the unit here petitioned for are not the area and industry practice. Specifically, the Employer believes that the evidence will show that

> (a) at some locations where Petitioner represents stationary engineers, the overall groups of powerhouse or boiler room employees are divided into two collective bargaining units, one represented by Petitioner and the other represented by Local 7, International Brotherhood of Firemen and Oilers.
>
> (b) at some locations where Petitioner represents stationary engineers, the represented employees perform no work on air conditioning equipment, and this work is performed by employees represented by another labor organization or by unrepresented employees.
>
> (c) at some locations where Petitioner represents stationary engineers, Petitioner also represents as part of the same unit employees performing other maintenance functions.

J. A. 68-69. In his Decision and Direction of Election, the Regional Director observed (J. A. 76-77):

(Footnote continued on next page.)

recognized the mixed pattern of representation and Bell & Howell does not contend that the finding was erroneous. Therefore we conclude that Bell & Howell was provided an ample opportunity to present relevant evidence on the appropriateness of the Unit that Local 399 sought to represent.

(Footnote continued from preceding page.)

The Employer contends that the record is incomplete with regard to evidence bearing on Petitioner's history, practice and experience in representing the type of employees in the unit sought; the area and industry practice regarding the representation of the type of employees in the unit sought; and the effect that a separate stationary engineers unit would have on the Employer's industrial relations. On the basis of the entire record, it is the opinion of the undersigned, and I find that there is sufficient evidence in the record to make a determination appropriately taking into account the factors that the Employer suggests are missing.

. . . . Various types of employers employ stationary engineers represented by the Petitioner, to wit; a building managers association, a hotel association, individual laundries, shopping centers, office complexes, numerous industries, hospitals, and governmental units. 20 to 25 percent of Petitioner's members are engaged in manufacturing of production concerns, the record indicates that duties Petitioner's members perform at various laundry and manufacturing concerns are similar in nature to those duties performed by the employees in the unit sought. The record also indicates that employees performing duties similar in nature to those in the unit sought are represented by other unions on a plant-wide basis without adverse effects on industrial relations.

* * * * *

Upon examining the record as a whole and weighing all relevant evidence and factors, I find that since the stationary engineers work in the boilerroom which is separated from the rest of the facility by a locked door, work 24 hour—7 days a week regularly, are required to have experience and training, perform the same type of work often called "powerhouse" work, have separate seniority rights apart from the rest of the maintenance employees, have their own day to day supervisor, perform work in the boilerroom of a type which is rarely, if ever done by other employees, spend a substantial period of time in the boilerroom apart from the maintenance and production workers, have their own locker and washroom facilities, generally have lunch away from other employees, and further since Petitioner represents and has represented employees performing similar duties in similar operations in the area, I find the stationary engineers to be an appropriate unit. . . .

IV. Conclusion

We conclude that the Board properly certified Local 399 as the collective bargaining representative for Bell & Howell's stationary engineers and that Bell & Howell was therefore obligated to bargain in good faith with the union. Accordingly, the decision of the Board, holding that Bell & Howell's refusal to bargain with Local 399 violated §§ 8(a)(5) and (1) of the LMRA is

Affirmed.

APPENDIX B

Bell & Howell Company and International Union of Operating Engineers, Local 399, AFL-CIO, Petitioner.
Case 13-RC-13022

September 20, 1974

DECISION AND CERTIFICATION OF REPRESENTATIVE

On January 15, 1974, the Regional Director for Region 13 issued a Decision and Direction of Election in the above-entitled proceeding. On February 15, 1974, a secret ballot election was conducted among the employees in the unit.[1] The tally of ballots furnished the parties showed that of approximately eight eligible voters eight cast valid ballots, of which seven were for, and one against, the Petitioner.

Thereafter, on February 20, 1974, the Employer filed with the Regional Director a motion to disqualify the Petitioner as collective-bargaining representative. On March 8, 1974, the Regional Director transferred this matter to the Board for decision.

In its motion the Employer argues, *inter alia*, that the motion for disqualification should be granted based on the following contentions:

1. Since, according to the testimony of Richard Wren, president and business representative of Petitioner, Petitioner exercises substantial control over the stationary engineering

1. All stationary engineers and stationary firemen in department 2889 at the Employer's facility at 7100 N. McCormick Blvd., Lincolnwood, Illinois, but excluding all office clerical employees, plant clerical employees, guards and supervisors as defined in the Act, and all other employees.

trade in the Chicago area, the Employer contends that membership in the Petitioner is the *sine qua non* for obtaining employment in the trade in the Chicago area. Accordingly, the Employer argues that the absence of female stationary engineers is the natural effect of Petitioner's alleged discriminatory policies.

2. Petitioner's bylaws provide for a death benefit payable to "beneficiaries of members." The primary beneficiary is a member's "widow." No provision is made for a member's "widower." The Employer claims that the Petitioner's plan, whereby death benefits are payable to the surviving spouse of a male member, but not to the surviving spouse of a female member, unlawfully discriminates on the basis of sex in violation of section 703(c), Title VII of Civil Rights Act of 1964, as amended.

3. Petitioner's group insurance plan which provides benefits for members who are employed by employers with whom Petitioner has agreements is alleged to be discriminatory. Maternity benefits are provided for "dependent wives" of male employees, but no maternity benefits are provided for female employees. The Employer contends that the maintenance of such an agreement which discriminates on the basis of sex is in violation of section 703(c), Title VII of the Civil Rights Act of 1964, as amended.

4. The Employer contends that none of Petitioner's officers or business representatives is female. In addition, the Employer asserts that it contacted a number of the employers who have contracts with Petitioner, and that, of the more than 1,000 persons who are members of Petitioner[2] and who are covered by these contracts, not one is female. The Employer points that this complete absence of female officers, business representatives, and members establishes a *prima facie* case of past discrimination.

2. The Employer states that Petitioner has 4,300 members.

5. Combining all of the above-mentioned allegations, the Employer argues that the natural effect has been to discourage females from attempting to enter the stationary engineering trade in the Chicago area. Therefore, on the basis of *N. L. R. B.* v. *Mansion House Center Management Corp.*, 473 F. 2d 471 (C. A. 8, 1973), the Employer argues that Petitioner should be disqualified as the collective-bargaining representative of the employees in the appropriate unit.

On February 21, 1974, the Employer forwarded a letter to the Regional Director for Region 13 in further support of its motion to disqualify the Petitioner. In this letter, the Employer directed the Regional Director's attention to the "Geographical Profile of Employment and Unemployment, 1972" published by the Bureau of Labor Statistics. This report, the Employer submits, shows that in the Chicago Standard Metropolitan Statistical Area (SMSA) the civilian labor force numbers 3,099,000. Of that total, the report states that 1,069,000 are women 20 years or over. The Employer concludes from these statistics that 34 percent of the civilian labor force in the Chicago SMSA are women. However, the Employer contends that there are 0 percent women among Petitioner's members who are stationary engineers. Thus, the Employer requested a hearing to present evidence tending to show that Petitioner unlawfully discriminates against females.

On May 8, 1974, the Petitioner filed an opposition to the motion to disqualify. The Petitioner argued, *inter alia,* that it does not have a contractually established exclusive hiring hall and exercises no control over the composition of the work force it represents or seeks to represent. The Petitioner claims to "take the work force it represents as it finds it." Moreover, the Petitioner argues that on the basis of *Washington Sheraton Corporation, t/a Sheraton Park Hotel & Motor Inn,* 199 NLRB 728 (1972), the Board should reject an attempt to disqualify a union, where there is no evidence that there are any female employees in the unit sought. For under *Washington Sheraton,*

the Petitioner argues, the test to establish unlawful discriminatory practices is relevant with respect to only the employees in the unit sought. Since there is no evidence of female employees in the unit sought, the Petitioner contends that the question of discrimination is not relevant.

On May 14, 1974, the Employer filed a reply to Petitioner's opposition to the motion to disqualify and on May 16, 1974, the Employer requested oral argument before the Board.

The Petitioner, on June 13, 1974, in a letter to the Board, requested that, in light of *Bekins Moving & Storage Co. of Florida, Inc.*, 211 NLRB No. 7 (1974), the case be returned to the Region with instructions that a certification be issued.

Thereafter, on June 19, 1974, the Employer filed a motion for leave to file an additional brief in light of the *Bekins, supra,* decision. On June 21, 1974, the Petitioner filed an opposition to the Employer's motion for leave to file an additional brief.

The Board has considered the entire record in this case with respect to the issues raised by the motions and briefs and finds as follows:

The Employer's motion to disqualify the Petitioner as the collective-bargaining representative; its request for oral argument; and its motion for leave to file an additional brief are hereby denied.

We believe that disqualification of the Petitioner because it allegedly discriminates on the basis of sex is neither required by the Constitution nor permitted by the Act. As we stated in our dissent in *Bekins Moving & Storage Co. of Florida, Inc., supra,* we would "leave such questions as they may raise, with respect to the Petitioner's willingness or capacity to represent all employees in the bargaining unit, to be resolved in other proceedings under the Act."

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots have been cast for International Union of Operating Engineers, Local 399, AFL-CIO, and that, pursuant to Section 9(a) of the National Labor Relations Act, as amended, the said labor organization is the exclusive representative of all the employees in the unit found appropriate herein for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

MEMBER KENNEDY, concurring:

I agree with Member Fanning and Member Penello to the extent that I would deny the Employer's motion to disqualify the Petitioner since that motion is based on alleged sex discrimination by the Petitioner. I do not believe that the Board should entertain an allegation that a labor organization discriminates on the basis of sex in a precertification representation proceeding.

Accordingly, I concur with Members Fanning and Penello in issuing a certification to the Petitioner in these circumstances. In *Bekins,* I stated that "the Board must entertain allegations that a labor organization excludes persons from membership on the basis of race, alienage, or national origin." Each of these classifications has been determined by the Supreme Court to be inherently suspect,[3] thus requiring strict judicial scrutiny. In *Kahn* v. *Shevin, Attorney General of Florida, et al.,* 416 U. S. 351 (1974), and more recently in *Geduldig* v. *Aiello,* 417 U. S. 484 (June 17, 1974), the majority of the Supreme Court refused to find legislative classifications based on sex inherently suspect.

3. See *Loving* v. *Virginia,* 388 U. S. 1, 11 (1967); *McLaughlin* v. *Florida,* 379 U. S. 184, 191-192 (1964); *Graham, Commissioner, Department of Public Welfare of Arizona* v. *Richardson,* 403 U. S. 365, 372 (1971); *Oyama* v. *California,* 332 U. S. 633, 644-646 (1948).

In my view, the Board must satisfy its constitutional responsibilities in a manner which will least interfere with the procedures by which employees select a bargaining representative. Therefore, the Board should move into this developing area of the law one step at a time.

In *Bekins,* Chairman Miller and Member Jenkins stated that "after much deliberation, we have concluded that we are not yet sufficiently experienced in this newly developing area of the law to enable us to codify, at this time, our approach to such issues, either procedurally or substantively." By the same token, we are not sufficiently experienced at this time to effectively address ourselves to the entire spectrum of the discrimination area by adjudicatory means.

Accordingly, it is my belief that the most judicious and reasonable method of approach is to address ourselves, at this juncture, to the most serious forms of unlawful discrimination. Thus, in precertification representation proceedings, the Board should only view allegations of discrimination which involve classifications determined by the Supreme Court to be inherently suspect, that is, race, alienage, or national origin. It must be emphasized that I do not approve or condone any form of unlawful discrimination. However, I agree with Judge Wisdom of the Fifth Circuit that "an Agency need not strike at all evils at the same time . . . reform may take one step at a time addressing itself to the phase of the problem which seems most acute." *Ray Baillie Trash Hauling, Inc., et al.* v. *Kleppe,* 477 F. 2d 696, 704 (C. A. 5, 1973).[4]

Accordingly, I would not view an allegation of unlawful sex discrimination in a precertification representation proceeding. Nevertheless, this does not foreclose a party from raising this question after certification has issued. For I would then view the activity as a possible breach of the statutory duty of fair

4. See also *Williamson* v. *Lee Optical Co.,* 348 U. S. 483, 489 (1955).

representation. See *Independent Metal Workers Union, Local No. 1 (Hughes Tool Company)*, 147 NLRB 1573 (1964).

Even if I am in error with respect to the obligation of this Agency to consider discrimination on the basis of sex as an impediment to certification of a labor organization, I do not believe that the allegations in the Employer's motion raise issues which warrant delay in certifying Petitioner. There is no allegation that Petitioner's constitution or bylaws deny membership to females. In my view, bylaw provisions which provide death benefits to widows and maternity benefits for dependent wives impose no constitutional impediment to certification.

The Employer alleges in its motion that Petitioner exercises control over stationary engineers in the Chicago area and the absence of females in its membership suggests that Petitioner is engaged in a pattern or practice of sex discrimination. In the absence of a Supreme Court directive, I am unwilling to litigate the lawfulness of an alleged discriminatory hiring hall in a representation proceeding. Nor am I willing to convert our representation cases to a title VII lawsuit on the basis of allegations that Petitioner has no female business agents or officers and that there is a statistical imbalance with respect to the number of women who are members of Petitioner.

Accordingly, the Employer's motions should be denied and Petitioner certified.

CHAIRMAN MILLER and MEMBER JENKINS, dissenting:

Unlike our colleagues, we would find that the Employer has raised substantial questions of fact and law with respect to whether the Petitioner engages in discrimination on the basis of sex. Therefore, we would order a hearing to develop all of the relevant facts concerning the Employer's allegations and to afford the Petitioner an opportunity to present a defense to such contentions.

In *Bekins*, we stated that if it is shown that a union fails to fairly represent employees, "we must, in order that our own actions conform to the Constitution, take the drastic step of declining to certify the labor organization." Before this action is contemplated we must have the relevant facts and the parties' contentions before us. Accordingly, a hearing to ascertain this information is an absolute necessity.

Here, the Employer has proffered *prima facie* evidence which challenges the Petitioner's ability to fairly represent employees. The Employer contends, *inter alia*, that the Petitioner exercises substantial control over the stationary engineering trade in the Chicago area. In fact, the Employer argues that membership in Petitioner is the "*sine qua non* for obtaining employment" in this field. The Employer contends that the Petitioner has no female officers or business representatives. It also alleges that on the basis of its own survey the Petitioner has no female members. Moreover, the Employer points to the Petitioner's bylaws and its group health plan as having the natural effect of discouraging females from attempting to enter the stationary engineering trade in Chicago.

In our view, the serious contentions made by the Employer compel that a hearing be held on these issues and that a determination be made on the merits before a certification is issued. Member Kennedy asserts that the Board should not consider allegations of sex discrimination in a precertification representation proceeding. We disagree. In *Bekins*, we clearly defined our position with respect to the constitutional origin of the duty of fair representation.

Since we believe that a labor organization which discourages females from membership would violate its duty to fairly represent all employees, we feel that the Board must consider such allegations in a precertification representation proceeding. In our opinion, the majority is in error in refusing to consider such allegations and in failing to order a hearing to obtain the relevant facts. To issue a Board certification to the Petitioner, not-

withstanding *prima facie* evidence that the Petitioner discriminates on the basis of sex, serves only to erode the well-established principle that a collective-bargaining agent must represent all employees fairly.

Therefore, for the above-stated reasons, we would order a hearing to determine whether the Petitioner discriminates on the basis of sex.

APPENDIX C

Bell & Howell Company and Local 399, International Union of Operating Engineers, AFL-CIO.

Case 13-CA-13680

September 29, 1975

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND PENELLO

Upon a charge filed on October 23, 1974, by Local 399, International Union of Operating Engineers, AFL-CIO, herein called the Union, and duly served on Bell & Howell Company, herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 13, issued a complaint and notice of hearing on November 22, 1974, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on September 20, 1974, following a Board election in Case 13-RC-13022 the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that,

1. Official notice is taken of the record in the representation proceeding. Case 13-RC-13022, 213 NLRB 407 (1974), as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F. 2d 683

(Footnote continued on next page.)

commencing on or about October 16, 1974, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On December 20, 1974, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On January 14, 1975, counsel for the General Counsel filed directly with the Board a motion to transfer proceedings to the Board and motion for summary judgment. On January 24, 1975, the Union also filed a motion for summary judgment. Subsequently, on April 1, 1975, the Board issued an order transferring the proceeding to the Board and a notice to show cause why the General Counsel's and the Union's motions for summary judgment should not be granted. On May 6, 1975, Respondent filed a response to notice to show cause.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motions for Summary Judgment

In its answer to the complaint and response to the notice to show cause, Respondent attacks certain of the determinations made by the Board in the underlying representation proceeding, Case 13-RC-13022.

Our review of the record indicates that on January 15, 1974, the Regional Director issued his Decision and Direction of Election in which he found, contrary to the Respondent, that a unit of stationary engineers and stationary firemen was appropriate and that Respondent was not prejudiced by certain rulings made by the Hearing Officer and the Regional Director as to the pro-

(Footnote continued from preceding page.)
(C. A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F. 2d 26 (C. A. 5, 1969); *Intertype Co.* v. *Penello*, 269 F. Supp. 573 (D. C. Va., 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F. 2d 91 (C. A. 7, 1968); Sec. 9(d) of the NLRA.

duction of documents and the eliciting of testimony at the hearing. Respondent filed with the Board a timely request for review with respect to these issues. However, by telegraphic order dated February 12, 1974, the Board denied the request for review on the ground that it raised no substantial issues warranting review.

The Union received a majority of the votes cast at an election held on February 15, 1974. Thereafter, on February 20, 1974, the Respondent filed with the Regional Director a motion to disqualify the Union as collective-bargaining representative on the ground that it discriminated on the basis of sex. On March 8, 1974, the Regional Director transferred this matter to the Board for decision. On September 29, 1974, the Board denied Respondent's motion and certified the Union.[2]

It is the General Counsel's and the Union's basic position that all issues in dispute were decided in the representation proceeding and that they are entitled to summary judgment as a matter of law. As reflected in its answer to the complaint and its response to the notice to show cause, Respondent's basic defense to the alleged 8(a)(5) and (1) violation is that the Board erred in certifying the Union because the Union allegedly discriminates on the basis of sex, because the certified unit is inappropriate, and because evidentiary rulings made by the Hearing Officer and by the Regional Director were erroneous. These matters raised here were fully considered by the Board in the representation proceeding and resolved adversely to the Respondent.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[3]

2. *Bell & Howell Company*, 213 NLRB 407 (1974).

3. See *Pittsburgh Plate Glass Co.* v. *N. L. R. B.*, 313 U. S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

All issues raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding.[4] We therefore find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. We shall, accordingly, grant the motions for summary judgment.[5]

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Respondent, Bell & Howell Company, is a corporation duly organized under, and existing by virtue of, the laws of the State of Illinois with offices and places of business in Lincolnwood and Evanston, Illinois, where it has been at all times material herein engaged in the manufacture and distribution of photographic and related miscellaneous products. During the past 12 months, Respondent, in the course and conduct of its business operations, sold and distributed from its Illinois facilities products valued in excess of $50,000 directly to points outside the State of Illinois.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of

4. Members Fanning and Penello, having certified the Union herein for the reasons set forth in the dissenting opinion in *Bekins Moving & Storage Co. of Florida, Inc.*, 211 NLRB 138 (1974), concur in the result herein.

5. Member Jenkins, while adhering to the views concerning sex discrimination expressed in his dissent in the representation proceeding, agrees that that proceeding was dispositive of the issue and thus joins in the judgment herein.

the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Local 399, International Union of Operating Engineers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All stationary engineers and stationary firemen in department 2889 at the Employer's facility at 7100 N. McCormick Blvd., Lincolnwood, Illinois, but excluding all office clerical employees, plant clerical employees, guards and supervisors as defined in the Act, and all other employees.

2. The certification

On February 15, 1974, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 13, designated the Union as their representative for the purpose of collective bargaining with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on September 20, 1974, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about October 3, 1974, and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about October 16, 1974, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since October 16, 1974, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively

with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F. 2d 600 (C. A. 5, 1964), cert. denied 379 U. S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F. 2d 57 (C. A. 10, 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Bell & Howell Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 399, International Union of Operating Engineers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All stationary engineers and stationary firemen in department 2889 at the Employer's facility at 7100 N. McCormick Blvd., Lincolnwood, Illinois, but excluding all office clerical employees, plant clerical employees, guards and supervisors as defined in the Act, and all other employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since September 20, 1974, the above-named labor organization has been and now is the certified and exclusive repre-

sentative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about October 16, 1974, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Bell & Howell Company, Lincolnwood, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local 399, International Union of Operating Engineers, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All stationary engineers and stationary firemen in department 2889 at the Employer's facility at 7100 N. McCormick Blvd., Lincolnwood, Illinois, but excluding all office clerical employees, plant clerical employees, guards and supervisors as defined in the Act, and all other employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Lincolnwood, Illinois, plant copies of the attached notice Marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 13, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

---

6. In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local 399, International Union of Operating Engineers, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All stationary engineers and stationary firemen in department 2889 at the Employer's facility at 7100 N. McCormick Blvd., Lincolnwood, Illinois, but excluding all office clerical employees, plant clerical employees, guards and supervisors as defined in the Act, and all other employees.

BELL & HOWELL COMPANY

APPENDIX D

Bell & Howell Company and Local 399, International Union of Operating Engineers, AFL-CIO. Case 13-CA-13680

June 24, 1977

SUPPLEMENTAL DECISION AND ORDER

On September 29, 1975, the National Labor Relations Board issued its Decision and Order[1] in the above-entitled proceeding finding that Respondent, hereinafter also called Bell & Howell, had engaged in and was engaging in unfair labor practices in violation of Section 8(a)(5) of the National Labor Relations Act, as amended. Respondent was ordered to cease and desist therefrom, and, upon request, to bargain collectively with Charging Party, hereinafter called the Union, as the exclusive bargaining representative of the employees in the designated unit.[2] On December 22, 1975, the Board notified the parties that it had decided, *sua sponte*, to reconsider its decision, and on January 19, 1976, notified the parties that oral argument would be held on February 2, 1976. Oral argument was held as scheduled,[3] and, thereafter, the American Federation of Labor and Congress of Industrial Organizations and the General Counsel each filed a statement of position.

The Board has reconsidered its decision in light of the entire record, including the oral argument and statements of position,

1. 220 NLRB 881.

2. All stationary engineers and stationary firemen in Department 2889 at the Employer's facility at 7100 N. McCormick Blvd., Lincolnwood, Illinois, but excluding office clerical employees, plant clerical employees, guards and supervisors as defined in the Act, and all other employees.

3. The Board granted the request of the United States Chamber of Commerce and the American Federation of Labor and Congress of Industrial Organizations to participate in the oral argument as *amici curiae*.

and has decided to reaffirm its previous Decision and Order for the reasons set forth below.

Respondent contends that the certification issued in the underlying representation proceeding[4] was invalidly issued because the Board refused to conduct a precertification investigation and hearing on the issue of whether the Union discriminates against women with respect to Union-maintained benefit plans and membership requirements and deprives women of an opportunity for employment as stationary engineers in the Chicago area. It is Respondent's view that the existence of such discrimination in any or all the particulars urged would require the Board, in accordance with the due process clause of the fifth amendment to the Constitution, to disqualify the Union from serving as the exclusive representative of Respondent's employees and to refuse to certify it as such representative notwithstanding it had won an election duly conducted in accordance with the provisions of Section 9 of the Act. Respondent further contends that, assuming constitutional considerations do not operate to invalidate the certification, such considerations nevertheless preclude the Board from issuing an order requiring Respondent to bargain with the Union because such an order places the imprimatur of the Federal Government on those discriminatory practices.

In our recent decision in *Handy Andy*,[5] we overruled the *Bekins* decision[6] and set forth the reasons we believe that relevant constitutional and statutory considerations do not require or warrant withholding certification of a union which has been duly selected as exclusive representative of an employer's employees.[7] In accordance with that decision, we find no merit to Respondent's argument that our certification of the Union is

4. *Bell & Howell Company*, 213 NLRB 407 (1974).

5. *Handy Andy, Inc.*, 228 NLRB 447 (1977).

6. *Bekins Moving & Storage Co. of Florida, Inc.*, 211 NLRB 138 (1974).

7. See also the dissenting opinion of Members Fanning and Penello in *Bekins, supra.*

defective and without force and effect, but, to the contrary, we find that the certification was properly issued in accordance with due process of law.

We also find no merit to Respondent's contention that the Board is constitutionally proscribed from ordering Respondent to bargain with the Union because of the latter's alleged discriminatory practices. The issue before us is whether Respondent refused and failed to recognize and bargain with the certified representative of its employees as their exclusive bargaining representative.[8] The refusal and failure are admitted by Respondent, and we have found that the certification was validily issued in effectuation of statutory policies. Clearly, then a violation of Section 8(a)(5) of the Act which makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representative of his employees" has been made out.

Contrary to the claim of Respondent, neither our Order nor court enforcement thereof aids or encourages the Union with which Respondent is required to bargain to engage in such invidious discrimination; indeed, such practices by the Union are prohibited by other provisions of the Act. For, it is well established that the Union's status as exclusive representative imposes upon it the statutory obligation to represent all employees in the unit fairly and in good faith without invidious discrimination.[9] As the Supreme Court recently had occasion to note in a case where it was also argued that the system of rights and obligations established by the Act to govern the collective-bargaining relationship should give way to the paramount value of combating racial discrimination:

> In vesting the representatives of the majority with this broad power Congress did not, of course, authorize a

8. Because of Respondent's admitted refusal to recognize and bargain with the Union, the latter has never had the opportunity to represent the employees in the bargaining unit and, thus, has never had the opportunity to demonstrate that its representation of those employees would accord with the dictates of the Act.

9. *The Wallace Corporation* v. *N. L. R. B.*, 323 U. S. 248 (1944).

tyranny of the majority over minority interests. First, it confined the exercise of these powers to the context of a "unit appropriate for the purposes of collective bargaining," *i.e.*, a group of employees with a sufficient commonality of circumstances to ensure against the submergence of a minority with distinctively different interests in the terms and conditions of their employment. See *Allied Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 171 (1971). Second, it undertook in the 1959 Landrum-Griffin Amendments, 73 Stat. 519, to assure that the minority voices are heard as they are in the functioning of a democratic institution. Third, we have held, by the very nature of the exclusive bargaining representative's status as representative of *all* unit employees, Congress implicitly imposed upon it a duty fairly and in good faith to represent the interests of minorities within the unit. *Vaca* v. *Sipes, supra; Wallace Corp.* v. *N.L.R.B.*, 323 U.S. 248 (1944); cf. *Steele* v. *Louisville & N.R. Co.*, 323 U.S. 192 (1944). And the Board has taken the position that a union's refusal to process grievances against racial discrimination, in violation of that duty, is an unfair labor practice. *Hughes Tool Co.*, 147 NLRB 1573 (1964); see *Miranda Fuel Co.*, 140 NLRB 181 (1962), enforcement denied 326 F.2d 172 C.A. 2, 1963). Indeed, the Board has ordered a union implicated by a collective-bargaining agreement in discrimination with an employer to propose specific contractual provisions to prohibit racial discrimination. See *Local Union No. 12, United Rubber Workers of America* v. *N.L.R.B.*, 368 F.2d 12 (C.A. 5, 1966) (enforcement granted).[10]

From the foregoing it is clear that the right of employees to be free from invidious discrimination in the representation afforded them by their bargaining representative is protected by the Act, which, it has been held, makes it an unfair labor practice for the representative to engage in such practices and provides employees with remedies against such conduct. For this reason, if not for any other, Respondent's contention that constitutionally the Board cannot issue, and the courts cannot enforce,

10. *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U. S. 50, 64-65 (1975).

an order directing Respondent to bargain with the Union as the employees' exclusive bargaining representative must fail. For, given the statutory restrictions upon the powers and authority of the exclusive majority representative, it simply cannot be established that either the certification or the bargaining order makes the Union's discriminatory practices the actions of the Government. To the extent the Union's discriminatory practices respecting eligibility for membership and Union-provided benefits bear upon and affect the Union's representation of Respondent's employees with respect to wages, hours, and terms and conditions of employment, they are undertaken in contravention of the certification and the bargaining order, not in accordance therewith, and the employees have a statutorily prescribed method of redress designed to permit elimination of the offending practices while preserving the collective-bargaining relationship. To the extent that such practices may be beyond the reach of the Board, because they do not impinge upon the organizational or representational rights of employees, Congress has provided other means by which the employees affected may seek redress and relief. Thus, in the Civil Rights Act of 1964, as amended,[11] the Equal Employment Opportunity Commission has been given authority to eliminate "unlawful employment practices" of unions certified by the Board as exclusive bargaining representatives. Such unlawful practices include the practice of discriminating against, segregating, or otherwise classifying members on the basis of race, color, sex, religion, or national origin.[12] Again, such practices are not taken pursuant to or in accordance with governmental approval but in contravention of these statutory enactments and well-established governmental policy which gives the victims of such practices appropriate means of redress and relief designed to eliminate the offensive practices while preserving the collective-bargaining relationship. Therefore, it is clear from all of the foregoing that enforcement of the bargain-

11. 42 U. S. C. 2000e.

12. 42 U. S. C. 2000e(2).

ing order herein does not constitute governmental action fostering or encouraging adherence to the claimed discriminatory practices of the Union.[13]

We recognize, of course that

> . . . national labor policy embodies the principles of nondiscrimination as a matter of highest priority, *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 (1974), and it is a commonplace that we must construe the NLRA in the light of the broad national labor policy of which it is a part. See *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 456-458 (1957).[14]

However, in determining whether these broad principles justify the withholding of a bargaining order in a case such as this, consideration must be given to whether such action promotes or runs counter to the basic policies and purposes of the Act we

13. See *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163 (1972); *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345 (1974). With all due respect to the courts of appeals which have held contrary to our views here, we decline to follow their lead. In *N. L. R. B.* v. *Mansion House Center Management Corp.*, 473 F. 2d 471 (C. A. 8, 1973), we note that the court failed to consider the teachings of *Moose Lodge* and did not have the benefit of the *Jackson* decision. Nor did it consider the fact that the respondent employer therein, like the Respondent here, was claiming possible infringement of the constitutional rights of its employees. As the Supreme Court has noted, Respondent "can complain only of the infringement of its own constitutional immunity, not that of its employees." *Erie Railroad Company* v. *Williams*, 233 U. S. 685, 697 (1914); *Virginia Railway Co.* v. *System Federation No. 40, Railway Employees Department of the American Federation of Labor*, 300 U. S. 515, 558 (1937). See also Leslie, "Governmental Action and Standing; NLRB Certification of Discriminatory Unions," 1 Ariz. St. L. J. 35, 38-46 (1974). Even were this an appropriate situation in which to permit an exception to that rule so that Respondent could assert the constitutional rights of its employees, its defense would still founder on the fact, as noted above, that Congress has established appropriate administrative machinery in the Act itself to safeguard those very rights while still ensuring to employees the right to be represented for purposes of collective bargaining by their duly designated representative.

14. *Emporium Capwell Co.* v. *WACO*, 420 U. S. at 66.

administer.[15] We have been admonished against both a single-minded administration of the Act which ignores other and equally important congressional objectives,[16] and against enforcing policies given to others to administer in the guise of enforcing the provisions of the Act.[17] Congress has charged the Board with the task of administering a statute which declares it

> . . . to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.[18]

To this end Congress provided in the Act for orderly procedures by which employees can select a union to act as their exclusive representative as well as giving the union, when so selected, a method of enforcing against their employer its right to so function. Congress has also provided the statutory methods by which the employees can enforce against the union their right to be represented fairly and in good faith without invidious discrimination. Congress has stopped short, however, of giving the Board authority over the internal affairs of unions, though it has regulated such matters by the passage of other legislation, notably the Civil Rights Act of 1964, as amended, and the Labor Management Reporting and Disclosure Act of 1959 (73 Stat. 419), both of which seek to protect employees in their

15. *National Association for the Advancement of Colored People* v. *Federal Power Commission*, 425 U. S. 662 (1976).

16. *Southern Steamship Co.* v. *N. L. R. B.*, 316 U. S. 31, 47 (1942).

17. *Local 1976, United Brotherhood of Carpenters and Joiners of America, AFL [Sand Door & Plywood Co.]* v. *N. L. R. B.*, 357 U. S. 93, 108-111 (1958).

18. Sec. 1 of the Act.

dealings with their unions. Whether considered solely from the standpoint of the Act we administer or as a matter of accommodating the several statutory schemes that together make up our broad national labor policy, we believe that withholding a bargaining order in circumstances such as those before us runs counter to our duty. We are persuaded that it is far better to preserve and promote the collective-bargaining relationship once properly established by an order requiring Respondent to bargain with the duly selected exclusive representative than it is to destroy it by withholding the bargaining order. The first course gives the bargaining representative no license to engage in the discrimination complained of by Respondent; indeed, any such action can be dealt with in a statutorily prescribed way by employees whose rights are infringed.[19] The second destroys the bargaining relationship (and may even eliminate the employees' right to proceed against the Union to eliminate the offensive

19. For example, Sec. 8(b)(1)(A) provides a statutory procedure by which employees may obtain elimination of offensive discriminatory practices which frustrate their right to fair representation by their bargaining representative or which otherwise restrain or coerce them in the exercise of Sec. 7 rights. Sec. 8(b)(2) enables them to obtain the elimination of union-sponsored discriminatory hiring practices. Sec. 8(b)(3) and Sec. 8(a)(5) provide avenues by which the parties and employees can insure that their exclusive representative and their employer negotiate about the elimination of offensive discriminatory terms and conditions of employment. Such unfair labor practice proceedings, when invoked by properly filed charges with the Board, are prosecuted by the Government and have the merit of dealing with offensive practices that have occurred and are continuing to occur in the bargaining unit, rather than with those which may possibly occur in the future, or have occurred in different bargaining units. The unfair labor practice proceeding will provide a sound evidentiary basis for remedial orders tailored to the situation calling for redress and which normally will permit the collective-bargaining relationship to continue to function free from the stultifying effect of the offensive practices. In appropriate circumstances, the remedy may even include revocation of the bargaining representative's authority to represent the employees, but such remedy will flow from the nature of the violation rather than from a policy of denying certification and the benefits of a bargaining order necessarily based on a presumption that the bargaining representative will not discharge its statutory responsibilities and live up to the obligation the statute imposes upon it.

practices), and does so without the certainty that the Union will mend its ways. To the extent this Board is charged with responsibility for carrying out aspects of the broad national policy against invidious discrimination in employment, we believe that responsibility is best discharged by an administration of the Act which addresses the issue of invidious discrimination when and where it becomes relevant in the exercise of the normal functions of this Agency. We are persuaded that inquiry into the Union's alleged discriminatory practices is not relevant here, and we believe a bargaining order is an appropriate remedy for Respondent's violation of Section 8(a)(5).

Our conclusion that the issue of whether or not a labor organization practices invidious discrimination is not appropriately raised in this case does not run afoul of the due process clause of the fifth amendment by denying Respondent an opportunity to present this issue in a proper proceeding. For, as we indicated in *Handy Andy*, these issues may be raised by filing a charge alleging that the union has breached its duty of fair representation in violation of Section 8(b)(1)(A) of the Act, or is refusing to bargain within the meaning of Section 8(d) and 8(b)(3). It is undisputed that no duty of fair representation arises until the union actually represents employees in a specific bargaining unit. Consequently, such issues are prematurely raised in a representation proceeding or in a proceeding, such as this, where the employer refuses to bargain in order to test the underlying certification. However, as soon as the union and the employer enter into a bargaining relationship and the union begins to represent the unit employees, it becomes subject to the duty of fair representation and, as we discussed in *Handy Andy*, that duty affords protection to unit employees from any discriminatory practices of their bargaining representative.

Proceedings under Section 8(b) are also preferable for resolution of issues involving invidious discrimination, as such proceedings directly focus upon discrimination affecting unit employees and afford due process protection to the charged labor

organization. First, the charging party, whether it be an employer, an employee, or some other person, must come forward with *prima facie* evidence of discrimination in the bargaining unit to warrant issuance of a complaint. Secondly, both the 6-month limitations period of Section 10(b) of the Act and the provisions of the Administrative Procedure Act apply to such proceedings. Furthermore, unfair labor practice proceedings are adversary in nature and subject to judicial review. Finally, an 8(b) proceeding permits a remedy tailored to fit the violations found, including a cease-and-desist order, affirmative conduct, and/or, if necessary, revocation of the labor organization's certification.[20] This method appears to us to be a far more appropriate means of remedying unlawful discrimination.

Inasmuch as we are not constitutionally required to consider claims of invidious discrimination in proceedings such as the instant case, we are not called upon to determine whether or not sex discrimination is constitutionally prohibited to the same extent as discrimination on the basis of race. We conclude, however, as we have in the past, that the duty of fair representation includes the duty not to discriminate on the basis of sex.[21] Accordingly, we shall treat claims of sex discrimination in the same manner as any other allegation of invidious discrimination.[22]

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20. *Independent Metal Workers Union, Local No. 1 (Hughes Tool Company)*, 147 NLRB 1573 (1964).

21. *Local No. 106, Glass Bottle Blowers Association, AFL-CIO (Owens-Illinois, Inc.)*, 210 NLRB 943 (1974), enfd. 520 F. 2d 693 (C. A. 6, 1975).

22. Member Murphy notes that although the proposed Equal Rights Amendment to the Constitution, which she vigorously supports, has not yet been ratified the national labor policy clearly forbids sex discrimination as well as race discrimination in the workplace. See Title VII, *supra;* Equal Pay Act of 1963, 73 Stat. 56, 29 U. S. C. 206(d); Executive Order 11246, as amended by Executive Order 11375 (1967); Age Discrimination in Employment Act of 1967; and Department of Labor Order No. 4 (1970), as revised April 2, 1972.

Of course, the National Labor Relations Act is also part of the national labor policy and it, too, forbids sex discrimination.

On the basis of the foregoing, we hereby affirm our original conclusions of law and Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby reaffirms its original Decision and Order in this proceeding and orders that the Respondent, Bell & Howell Company, Lincolnwood, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Board's original Order (220 NLRB 881).

MEMBER WALTHER, concurring:

I agree with my colleagues that this Board is not constitutionally required to consider claims of invidious discrimination by labor organizations in its 8(a)(5) certification test/summary judgment proceedings. Accordingly, I concur in their conclusion that the General Counsel's motion for summary judgment should be granted in this case.

Respondent contends that the Union here engages in invidious discrimination by virtue of the fact that (1) it has no women members, officers, or business representatives; (2) it maintains benefit plans which discriminate against women; and (3) it deprives women of opportunities for employment as stationary engineers in the Chicago, Illinois, area. To the extent that these claims are based upon the statutory duty of fair representation, I agree with my colleagues that not only are they premature in an 8(a)(5) certification test/summary judgment proceeding where the Union by definitions has not yet been afforded an opportunity to represent the employees at all, but also that such claims are more appropriately addressed in 8(b) proceedings. See my concurring opinion in *Handy Andy, Inc.*, 228 NLRB 447 (1977).

As I stated in *Handy Andy*, however, the proviso to Section 8(b)(1)(A) requires affording different treatment to assertions that a union discriminates in its membership policies. Such a claim has been raised here based on sex.

In most certification test/summary judgment proceedings, I would not entertain defenses based upon membership discrimination. As explained in *Handy Andy*, I would consider such issues at the very outset of the representation proceeding, prior to the direction of an election. Having been afforded an opportunity to litigate this issue in the representation proceeding, our normal rules with respect to relitigation would preclude respondents from raising it again at the summary judgment stage.

The instant case, of course, has not been processed in accordance with the procedures set forth in *Handy Andy*. Had such procedures been utilized, however, I still would have found Respondent's assertions to be unsupported in the record. As I stated in *Handy Andy*, claims of membership discrimination must be supported by evidence contained in a union's constitution, bylaws, or other written statement of policy indicating that the union restricts access to membership on the basis of race, alienage, national origin, or sex. Since no such documentary evidence has been presented either here or to the Regional Director, I do not view Respondent's assertions as a bar to the granting of summary judgment.

For the foregoing reasons, I agree that General Counsel's motion for summary judgment should be granted.

MEMBER JENKINS, dissenting:

The effect of the Supplemental Decision and Order in this case is to hold that the due process clause of the fifth amendment does not preclude the Board from certifying as statutory bargaining representative a Union which discriminates against women. Government sanction of invidious discrimination based on sex stands on no better footing than discrimination based on

race or national origin. Therefore, for the reasons set forth in my dissenting opinion in *Handy Andy, Inc.*, 228 NLRB 447 (1977), I disagree with my colleagues' upholding the validity of the Union's certification in this case without consideration of the claim that it engages in sex discrimination in its representation of employees.

As in *Handy Andy, supra*, my colleagues contend, among other things, that certification of a discriminating union, or issuance of a bargaining order, does not constitute prohibited Government action and that other remedies are available under both the National Labor Relations Act and other legislation to combat the Union's discriminatory practices. But, as I pointed out in *Handy Andy*, the Government invalidly participates whenever it sanctions, assists, or supports private discrimination. Certification of a union as the exclusive statutory bargaining representative "confers substantial benefits," as my colleagues acknowledged in *Handy Andy*, and endows the union with public rather than private rights. As I stated in *Handy Andy*, "Certification is thus an integral part of the representation function . . . and is patently direct participation and assistance by a Government agency . . . in the union's discriminatory representation." The availability of other remedies does not legitimize this unconstitutional conduct. The Constitution does not permit an arm of the Government to participate in invidious discrimination, against women or any other persons, until other remedies come into play.[23]

23. Respondent claims that one result of the Union's discriminatory practices is to exclude women from employment as stationary engineers. As a consequence, there would be no member of the bargaining unit to seek enforcement of the Union's "statutory obligation," upon which my colleagues rely as a satisfactory substitute for refusal to certify, "to represent all employees in the unit fairly."

APPENDIX E

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

BELL & HOWELL COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

LOCAL 399, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,
Intervenor.

No. 75-2002

JUDGMENT

Before: BAZELON, MCGOWAN and ROBB, Circuit Judges.

THIS CAUSE came on to be heard upon a petition filed by Bell & Howell Company, to review an order of the National Labor Relations Board issued against said Petitioner, its officers, agents, successors, and assigns, on September 29, 1975, as reaffirmed by supplemental order dated June 24, 1977, and upon a cross-application filed by the National Labor Relations Board to enforce said order, as reaffirmed. The Court heard argument of respective counsel on June 19, 1978, and has considered the briefs and transcript of record filed in this cause. On January 8, 1979, the Court, being fully advised in the premises, issued its opinion granting enforcement of the Board's order, as reaffirmed.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the District of Columbia Circuit that the said order, as reaffirmed, of the National Labor Relations Board in said proceeding be enforced, and that Petitioner, Bell & Howell Company, Lincolnwood, Illinois, its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order, as reaffirmed, contained.

/s/ DAVID L. BAZELON
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

/s/ CARL MCGOWAN
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

/s/ ROGER ROBB
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

APPENDIX F

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

Section 7 of the National Labor Relations Act, as amended (29 U. S. C. § 157), provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8(a)(1), 8(a)(5), 8(b)(1), 8(b)(2) and 8(b)(3) of the National Labor Relations Act, as amended (29 U. S. C. § 158), provide:

> (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.
>
> (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;
>
> (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;
>
> (3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

Section 9(a) and 9(c)(1) of the National Labor Relations Act, as amended (29 U. S. C. § 159), provide:

> (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.
>
> * * * * *
>
> (c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

No. 78-1640

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978

BELL & HOWELL COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A27) is not yet reported. The Board's decision and certification of representative (Pet. App. A28-A36) is reported at 213 N.L.R.B. 407. The Board's decision and order in the unfair labor practice proceeding (Pet. App. A37-A46) is reported at 220 N.L.R.B. 881. The Board's supplemental decision and order (Pet. App. A47-A59) is reported at 230 N.L.R.B. 420.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1979. The petition for a writ of certiorari was filed on April 27, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly determined that charges of sex discrimination, raised by an employer in opposition to the certification of a union as a collective bargaining representative, should be adjudicated in an unfair labor practice proceeding against the union rather than in a hearing on the question of certification.

STATEMENT

1. In April 1973, Local 399, International Union of Operating Engineers (Local 399), petitioned the National Labor Relations Board for a representation election among the stationary engineers employed at petitioner's plant in Lincolnwood, Illinois (Pet. App. A3). The election resulted in seven votes for Local 399, and one against (*id.* at A28). After the election, petitioner filed a motion to disqualify Local 399 as the collective-bargaining representative, alleging that it had engaged in various practices that discriminated against women (*ibid.*).[1] In September 1974, the Board certified Local 399 as the collective bargaining representative. It declined to adjudicate the issues raised by petitioner's motion to disqualify the union on the basis of alleged sex discrimination (Pet. App. A28-A34).[2]

---

[1]Petitioner charged generally that there was an absence of female stationary engineers in the Chicago area which was attributable to Local 399's discriminatory policies. Petitioner also charged that Local 399 had no female officers or business representatives and that an informal survey showed that it had no female members. Petitioner further alleged that Local 399 awarded certain death and maternity benefits on a sex-discriminatory basis (Pet. App. A29).

[2]An earlier decision of the Board, *Bekins Moving & Storage Co.*, 211 N.L.R.B. 138 (1974), held that charges of discrimination should be adjudicated in a certification proceeding. Members Fanning and Penello dissented from the holding in *Bekins*, concluding that such charges should be resolved in unfair labor practice proceedings against the union or through proceedings brought under Title VII of the Civil Rights Act. 211 N.L.R.B. 145-149. In the present case, members Penello and Fanning adhered to their position in *Bekins*. Member Kennedy filed a concurring opinion, concluding that "the Board should [not] entertain an allegation that a labor organization discriminates on the basis of sex in a precertification representation proceeding" (*id.* at A32).

Petitioner refused to bargain with Local 399 and the union filed unfair labor practice charges under Section 8(a)(1) and (5) of the Act, 29 U.S.C. 158(a)(1) and (5). The Board granted summary judgment against petitioner and entered a bargaining order (Pet. App. A37-A46). In a supplemental decision and order (*id.* at A47-A59), the Board reaffirmed its conclusion that petitioner's sex discrimination charges should be presented in an unfair labor practice proceeding, relying on its recent decision in *Handy Andy, Inc.*, 228 N.L.R.B. 447 (1977). In *Handy Andy*, the Board (Member Jenkins dissenting) over-ruled the *Bekins* case (discussed in note 2, *supra*) and announced that it would no longer consider charges of sex or racial discrimination before certifying petitioning unions as collective bargaining representatives.[3]

2. The court of appeals affirmed the Board's decision (Pet. App. A1-A27), concluding that the National Labor Relations Act does not require the Board "to consider allegations of discrimination prior to certifying a victorious union, at least where the proffered evidence of discrimination relates to past union misconduct outside the bargaining unit that the union seeks to represent" (*id.* at A19-A20).[4] The court

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[3]For the convenience of the Court, we have appended to this brief a copy of the decision in *Handy Andy*.

[4]The court added (Pet. App. A22 n.46): "We do not decide at this time whether a different result is required where the union's constitution or by-laws, or explicit conduct in a representation

pointed out that "[p]ermitting an employer to inject allegations of discrimination into a representation proceeding would tend to undermine [the protections] of the Act. Often an employer's allegations will require the Board to conduct extensive investigations. While these inquiries are carried out, the employees' choice of a representative is thwarted, and the delay may prove an effective tactic for eroding the union's support in the unit" (*id.* at A15; footnote omitted). The court added that the statutory purpose promptly to certify elected bargaining representatives could be fully accommodated with the goal of preventing discrimination through strict enforcement of the requirement of fair representation by collective bargaining agents under Sections 8(b)(1)(A), 8(b)(2), and 8(b)(3) of the Act, 29 U.S.C. 158(b)(1)(A), 158(b)(2), and 158(b)(3) (*id.* at A17).

In rejecting petitioner's contention that pre-certification adjudication of claims of discrimination is required to eliminate discriminatory practices, the court of appeals noted that denial of certification was not a remedy well suited to achieve that purpose (Pet. App. A17-A18; footnotes omitted):

> First, denying certification or withholding a bargaining order from a discriminatory union may be an ineffective remedy for union discrimination. These sanctions will have no effect on unions that are strong enough to establish collective bargaining relationships with employers without recourse to the Board.
>
> Second, these sanctions are at odds with the remedial focus of the Board's authority. At best, denying certification or withholding a bargaining order will prevent future discrimination in the unit that the union seeks to represent. That sanction provides no remedy for those who are already victims of the union's discrimination. * * * Finally, to give the Board responsibility for investigating allegations of past union discrimination that occurred outside the unit for which the union seeks certification would unnecessarily duplicate the functions of the EEOC. The broader scope of the EEOC's investigative and remedial authority, its expertise in detecting subtle and complex forms of discrimination, and its single-purpose anti-discrimination mission combine to make the EEOC a preferable vehicle for eliminating union discrimination.

The court of appeals also rejected petitioner's assertion that certification of a union charged with prior acts of sex discrimination would "significantly involve" the federal government in such discrimination in contravention of the Fifth Amendment. The court pointed out that "[f]ar from authorizing and encouraging discrimination, certification subjects the union to additional sanctions for any future discrimination," including cease and desist orders and orders for monetary compensation for victims of discrimination (*id.* at A21).

---

election, establish that the union will discriminate in the unit in question." The court noted that petitioner "has not alleged that the local's by-laws exclude women, nor that the union in its campaign promised to discriminate if selected as exclusive bargaining representative." Moreover, while the Union's "governing instruments" provide for the payment of "maternity benefits to 'dependent wives' but not 'female employees' " and of a "death benefit to 'widows' but not 'widowers,' " petitioner "offered no evidence that 'widowers' or 'female employees' had or would in fact be denied such benefits discriminatorily * * *" (*id.* at A23 n.46).

ARGUMENT

1. The decision below is the first decision of a court of appeals to review the rule prescribed by the Board in *Handy Andy, Inc.*, 228 N.L.R.B. 447 (1977). Under that decision, which was applied by the Board in the present case, charges of discrimination may not be adjudicated at the certification stage, but rather must be presented in unfair labor practice proceedings before the Board, in Equal Employment Opportunity Commission proceedings, or in private litigation brought by victims of discrimination. The Board has determined that this approach will provide effective sanctions against discrimination without retarding the certification of elected bargaining representatives and without interfering with the statutory right of employees to bargain collectively.

Although, as petitioner contends (Pet. 6-7), the decision below conflicts with the decision of the Eighth Circuit in *NLRB* v. *Mansion House Center Management Corp.*, 473 F. 2d 471 (8th Cir. 1973),[5] that decision was rendered without benefit of the Board's analysis in *Handy Andy*. The court in *Mansion House Center* had no opportunity to consider the adequacy of the rationale that now has been delineated by the Board for its procedure to accommodate the rights of fair representation and self-determination within the bargaining unit. If, as *Handy Andy* demonstrates, both of those rights can be adequately protected through the procedure that the Board has prescribed, there is little basis for inferring that the Eighth Circuit will continue to adhere to its interpretation in *Mansion House*

[5]In *Mansion House Center*, the Eighth Circuit concluded that charges of racial discrimination required a hearing when raised by employers in the circumstances presented here.

Center. For this reason, we believe that granting certiorari to resolve the conflict between the Eighth Circuit and the D.C. Circuit is unnecessary at the present time. If, after the Eighth Circuit has had occasion to consider the Board's rationale in *Handy Andy*, that court agrees with the D.C. Circuit that the *Handy Andy* rationale is sustainable, further review by this Court will not be required.

2. In the case of *Bekins Moving & Storage Co.*, 211 N.L.R.B. 138 (1974), the Board adopted a rule substantially similar to that of the Eighth Circuit in *Mansion House Center*. In *Bekins*, the Board concluded that certification of a labor organization shown to be engaged in a pattern or practice of invidious discrimination would be tantamount to governmental approval of such conduct. *Id.* at 139. For that reason, the Board concluded that a pre-certification inquiry into the union's willingness to represent employees on a fair and equal basis was required by the Fifth Amendment. Significantly, however, the Board stated that its views on this question were in a state of flux and it declined to announce final substantive or procedural rules: "[a]fter much deliberation, we have concluded that we are not yet sufficiently experienced in this newly developing area of the law to enable us to codify, at this time, our approach to such issues, either procedurally or substantively." *Id.* at 141.[6]

Continued study of the problem raised in the *Bekins* case led the Board to overrule that decision in *Handy Andy, Inc., supra*. In *Handy Andy*, the Board

[6]The Board also pointed out the possibility that in some cases "correction of such statutory violations [may] best [be] left to the expertise of other agencies or to remedial orders less draconian than the total withholding of representative status." *Id.* at 140.

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concluded that "the policies of the Act are better effectuated by considering allegations that a labor organization practices invidious discrimination in appropriate unfair labor practice rather than representation proceedings." 228 N.L.R.B. at 448. The Board acknowledged its obligation to eliminate discriminatory practices, but noted that, as a general matter, unfair labor practice proceedings are better adapted to adjudicate charges of discrimination than hearings at the certification stage. The Board also emphasized the increased procedural safeguards available in unfair labor practice proceedings: "issues involving alleged invidious discrimination by a labor organization should be considered in an adversary proceeding in which the accused union is accorded the full spectrum of due process, including particularly the right of judicial review." *Id.* at 454.

Although it overruled the *Bekins* case, the Board noted in *Handy Andy* that it "has considered, and will continue to consider, in representation proceedings the possible impact of clearly existing invidious discrimination within the unit at issue or of appeals to prejudice directed at employees in such unit in cases where an inquiry into these matters is necessary to protect the fairness of the election process." *Id.* at 454. In the present case, petitioner raised no charge of invidious conduct by the union within the collective bargaining unit.

In affirming the Board's order in the present case, the court of appeals correctly noted that the *Handy Andy* rationale effectively guarantees the rights of fair representation and self-determination in the bargaining unit (Pet. App. A19; footnotes omitted):

> In contrast to denial of certification before the union becomes exclusive bargaining representative, sanctions based on violations of the duty of fair representation are more likely to be effective in providing a remedy for victims of discrimination * * *. The duty of fair representation applies to all exclusive bargaining representatives, not simply to those who use the Board's electoral or remedial machinery. Complaints that the union has violated its duty of fair representation are more likely to be brought by the individuals who are the victims of discrimination. This appropriately focuses the Board's inquiry on the union's conduct in a particular bargaining unit, easing the Board's fact-finding activities. When the complaint is brought by a victim of discrimination, the Board can tailor its order to redress specific instances of discrimination, making the victims whole, and, at the same time, providing more protection for the employees' right of self-determination.

3. In reaching a different result in *Mansion House Center, supra,* the Eighth Circuit concluded that "constitutional limitations on the Board's process require recognition of a charge of racial discrimination as an appropriate ground of inquiry where a union's representative capacity is questioned" (473 F. 2d at 474). The basis of that holding was the court's belief that "[f]ederal complicity through recognition of a discriminating union serves not only to condone the discrimination, but in effect legitimatizes and perpetuates such invidious practices" (*id.* at 477). As the Board's analysis in *Handy Andy* demonstrates, however, the right of fair representation sought to be protected by the Eighth Circuit can be vindicated most effectively in an unfair labor practice proceeding. By certifying the elected representative and thereafter strictly enforcing the duty of fair representation, the Board does not legitimatize or perpetuate discrimination; to the contrary, it increases the likelihood that it

will be eliminated. In these circumstances, it is reasonable to anticipate that the Eighth Circuit may well defer to the balance struck by the Board in *Handy Andy*, a case decided several years after *Mansion House Center* was handed down. There is accordingly no need at this time for this Court to resolve the conflict between the decision below and the decision in *Mansion House Center*.[7]

[7] *NLRB* v. *Sumter Plywood Corp.*, 535 F. 2d 917 (5th Cir. 1976), cert. denied, 429 U.S. 1092 (1977), does not conflict with the decision below, as the D.C. Circuit recognized (Pet. App. A20 n.40). *Sumter* concluded that, while the issue of fair representation might be appropriate "for the Board to consider in certification proceedings or as an affirmative defense in a refusal to bargain proceeding" (535 F. 2d at 930), the " 'drastic step' of refusing to certify a union should be taken only in response to a strong demonstration [that] the union has in fact engaged in a pattern of racially discriminatory practices, and is likely to continue such practices" (*id.* at 931). The court below refrained from deciding "whether the Board could constitutionally exclude evidence that establishes the union's intention to discriminate *in the future* in the unit for which the union seeks certification" (Pet. App. A20 n.40). See also note 4, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DOJ-1979-05

APPENDIX

Handy Andy, Inc. and Mason M. New, Petitioner, and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, General Drivers & Helpers Local Union No. 657.

Case 23-RD-324

February 25, 1977

DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to a petition for decertification filed on May 14, 1974, and a Stipulation for Certification Upon Consent Election approved May 28, 1974, by the Regional Director for Region 23 of the National Labor Relations Board, an election by secret ballot was conducted on June 14, 1974, under the direction and supervision of the said Regional Director, among the employees in the appropriate bargaining unit set forth in the stipulation. At the conclusion of the counting of the ballots, a tally of ballots was prepared and served on the parties which showed that, of approximately 198 eligible voters, 175 cast ballots, of which 108 were cast for, and 66 against, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, General Drivers & Helpers Local Union No. 657, herein called the Union. There was one challenged ballot, an insufficient number to affect the results. Thereafter, the Employer filed a timely objection to the issuance of certification of the Union as bargaining representative.

In accordance with the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Regional Director conducted an investigation and, on August 19, 1974, issued and duly served on the

parties his Report and Recommendation on Objection, in which he recommended that the Employer's objection be overruled and that the Union be certified as the exclusive bargaining representative of the employees in the unit involved herein. Thereafter, the Employer filed timely exceptions to the Regional Director's Report.

On December 29, 1975, the Board, having determined that this and a number of other cases involving alleged race and sex discrimination on the part of labor organizations presented issues of importance in the administration of the National Labor Relations Act, as amended, scheduled oral argument in this and other cases[1] limited to all issues arising from *N.L.R.B.* v. *Mansion House Center Management Corporation,* 473 F. 2d 471 (C.A. 8, 1973), and *Bekins Moving & Storage Co. of Florida, Inc.,* 211 NLRB 138 (1974), Members Fanning and Penello dissenting. Oral arguments were heard on February 2, 1976. *Amici curiae* arguments were also heard at that time.[2]

Upon the entire record in this case, including the exceptions and oral arguments, the General Counsel's statements of position, and the *amici* briefs, the Board finds:

1. The Employer is engaged in commerce within the meaning of Section 2(2) of the Act and it will

[1] *Trumbull Asphalt Company, Inc.*, Case 25-RC-5719; *Bell & Howell Company,* Case 13-CA-13680; and *Murcel Manufacturing Corporation,* Cases 10-CA-10122, 10-CA-10152, and 10-RC-9502.

[2] The American Federation of Labor and Congress of Industrial Organizations and the Chamber of Commerce of the United States submitted briefs and presented oral argument as *amici curiae.*

effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of the employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The parties agree, and we find, that the following unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All warehouse employees, dock workers, truck drivers, sanitation drivers and helpers, shipping and receiving clerks, warehouse clerical employees, garage mechanics, fork lift and pallet jack maintenance employees and custodial employees employed at the Employer's grocery warehouse, produce warehouse, Harry Tappan Institutional Warehouse and meat products warehouse located in Bexar County, Texas, excluding all other employees including all maintenance and construction shop employees, poultry processing plant employees, bakery employees, office clerical employees, guards, watchmen and supervisors as defined in the Act.

5. The Employer's sole objection to the issuance of a certification to the Union is that

> [t]he Union . . . practices invidious discrimination by engaging in practices such as excluding persons from membership on the basis of race, alienage or national origin and/or is shown to have a propensity to fail to represent employees fairly.

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The Employer contends that the Union's alleged discriminatory practices preclude it from being certified as an exclusive bargaining representative, citing *Bekins Moving & Storage Co. of Florida, Inc., supra.* As evidence in support of its objection, the Employer relies primarily upon several decisions by the United States Court of Appeals for the Fifth Circuit.[3] In these cases, the court held, *inter alia,* that certain seniority provisions of the National Master Freight Agreement, to which the Union is a party together with various employers (but not the Employer herein), were unlawful because they perpetuated the effects of the employers' past discrimination. Consequently, the court found that the Union, by being party to such an agreement, had violated Title VII of the Civil Rights Act of 1964.[4]

The Employer's reliance on *Bekins* is based on the majority's holding in that case that the Board is constitutionally required to consider issues raised by an objection grounded on alleged invidious discrimination prior to issuance of a Board certification of representative.[5] As the majority noted in *Bekins*, however, the

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[3] *Rodriquez, et al.* v. *East Texas Motor Freight, Southern Conference of Teamsters and Teamsters Local* 657, 505 F. 2d 40 (C.A. 5, 1974); *Herrera et al.* v. *Yellow Freight System, Inc.*, 505 F. 2d 66 (C.A. 5, 1974); *Resendis et al.* v. *Lee Way Motor Freight, Inc.*, 505 F. 2d 69 (C.A. 5, 1974).

[4] 42 U.S.C. §2000e to 2000e-17 (Supp. II, 1972), amending 42 U.S.C. §2000e to 2000e-15 (1964).

[5] Members Fanning and Penello dissented on grounds that withholding certification as exclusive representative from a union which has won a duly conducted Board election is neither required by the Constitution nor permitted by the provisions of the Act and that such action would undercut rather than

question of whether a labor organization's invidious discrimination constitutes objectionable conduct warranting withholding certification was a novel issue and one on which the Supreme Court has not ruled. We now conclude that the policies of the Act are better effectuated by considering allegations that a labor organization practices invidious discrimination in appropriate unfair labor practice rather than representation proceedings. Accordingly, for the reasons set forth hereafter, the *Bekins* decision is overruled.[6]

In our view neither the fifth amendment to the Constitution nor the National Labor Relations Act, as amended, requires the Board to resolve questions of alleged invidious discrimination by a labor organization before it may lawfully certify the union as the exclusive bargaining representative of employees in an appropriate unit. Indeed, it appears to us that the contrary is true; namely, that the Board is not authorized to withhold certification of a labor

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strengthen the Federal Government's efforts to eliminate the discriminatory practices in issue.

Member Kennedy in his concurring opinion agreed that issues involving alleged discrimination on the basis of race, alienage, or national origin are appropriately raised in a precertification inquiry, but expressed his view that, although the Board is constitutionally required to consider such issues prior to certifying a labor organization as an exclusive bargaining representative, there is no similar constitutional requirement concerning alleged discrimination on the basis of sex. Our discussion herein relates to all allegations of invidious discrimination, assuming, without deciding in this case, that the same considerations necessarily apply.

[6] Members Fanning and Penello join in overruling the *Bekins* decision for the same reasons that led them to dissent therefrom and for such additional considerations as are expressed in this decision.

organization duly selected by a majority of the unit employees. In so holding we are fully cognizant of our continuing obligation under the statute to police the conduct of certified unions as it relates to their duty of fair representation. Issues relating to whether a union engages in unlawful race, sex, or other invidious forms of discrimination have historically been considered by the Board in the context of unfair labor practice proceedings. Such a proceeding, for the reasons discussed below, continues to be the appropriate vehicle for resolving such issues and for devising the appropriate remedies for unlawful discrimination including revocation of certification. This route recognizes the substantive and procedural differences between representation and unfair labor practice proceedings and affords the charged party the full panoply of due process of law without at the same time denying or delaying the employees' right to the services of their designated bargaining agent.[7]

The majority in *Bekins* concluded that precertification consideration of alleged invidious discrimination by labor organizations is required by the fifth amendment to the Constitution because the Board may not lawfully bestow its certification upon a union which in fact discriminates on the basis of such considerations. The majority stated that, under the

[7]The question involved here has been analyzed and discussed at length with clarity and distinction by Mr. Richard Bader in his law review note, "The Impact of De Facto Discrimination by Unions on the Availability of NLRB Bargaining Orders," 47 Southern California Law Review 1353 (1974). Our discussion below includes many of his observations. Subsequent to the publication of the article and graduation from law school, Mr. Bader became and is now a member of the staff of the National Labor Relations Board.

principle enunciated by the Supreme Court in *Shelley* v. *Kraemer*[8] and subsequent cases,[9] were the Board, as a Federal agency, to confer the benefits of certification on a labor organization which practices unlawful discrimination "the power of the Federal Government would surely appear to be sanctioning, and indeed furthering, the continued practice of such discrimination, thereby running afoul of the due process clause of the fifth amendment."[10]

The foregoing statement misconstrues the "state action" doctrine[11] as defined in *Shelley* v. *Kraemer*, *supra*, and its progeny. In *Shelley*, petitioners were blacks seeking to buy property covered by private restrictive covenants which prohibited occupancy of the covered premises by persons "not of the Caucasian race." The state courts had enforced the covenants and, consequently, had found that petitioner could not obtain valid title. The Supreme Court held that the agreement, standing alone, did not violate any constitutional right of petitioners, emphasizing that:

> [T]he principle has become firmly embedded in our constitutional law that the action inhibited by the [equal protection clause] of the Fourteenth

[8]334 U.S. 1 (1948).

[9]See, e.g., *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961); *Evans* v. *Newton*, 382 U.S. 296 (1966); *Evans* v. *Abney*, 396 U.S. 435 (1970).

[10]211 NLRB at 139.

[11]Although the equal protection clause does not by its terms apply to the Federal government, it is well settled that the due process clause of the fifth amendment imposes the same restrictions on Federal action that the fourteenth amendment imposes on state action. *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954).

> Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful. [Footnote omitted.][12]

The Court concluded, however, that enforcement of the covenants by state courts was state action subject to the equal protection clause. In so concluding, the Court commented:

> It is clear that but for the *active intervention* of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.
>
> These are not cases . . . in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are *cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights* in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. [Emphasis supplied.][13]

Thus, the prohibited state action in *Shelley* v. *Kraemer* was the *affirmative enforcement* by the State of a private agreement to discriminate.

Similarly, in *Peterson et al.* v. *City of Greenville,*[14] 10 blacks were arrested for trespassing after refusing to

[12]334 U.S. at 13.

[13]334 U.S. at 19.

[14]373 U.S. at 244 (1963).

leave a segregated lunch counter. In reversing their convictions, the Supreme Court noted that a local ordinance requiring segregation at lunch counters had removed the decision to segregate from the sphere of private choice,[15] and thus sufficiently involved the State in the counter manager's discrimination to violate the equal protection clause.[16] Thus, the case stands for the principle that a governmental body which *requires* a private party to discriminate runs afoul of the fifth or fourteenth amendments.

The governmental action doctrine, as applied to statutes and regulations, was further expanded in *Reitman* v. *Mulkey*[17] to extend to mere "authorization" of private discrimination. In that case, an amendment to the California state constitution, which prohibited any governmental agency within the State from abridging the absolute discretion of any property owner to sell or lease, or to refuse to sell or lease, his property to anyone for any reason, was declared unconstitutional.[18] Although purporting to remain neutral on the question of private racial discrimination in housing, the amendment repealed two open housing statutes, and erected a barrier to attaining any such legislation in the future. The Court held that, taken in the context of the conditions and attitudes of its passage, the amendment "was intended to authorize, and does authorize, racial discrimination in the housing

[15]373 U.S. at 248.

[16]373 U.S. at 248.

[17]387 U.S. 369 (1967).

[18]The Court "accepted" the ruling of the California Supreme Court, which had so held. 387 U.S. at 381.

market."[19] Thus, the prohibited state action in *Reitman* was *authorization* by the State of private discrimination.

Finally, in *Moose Lodge No. 107* v. *Irvis*,[20] a state liquor control agency, in granting liquor licenses, promulgated numerous regulations with which licensees had to comply. One of these required that "[e]very club licensee shall adhere to all of the provisions of its Constitution and By-laws."[21] Moose Lodge had a provision in its constitution which denied membership to blacks. The trial court had relied on the pervasive regulation of the club's activity by the liquor control board in ruling that the agency was sufficiently implicated with the discriminating club to violate the fourteenth amendment. But the Court, in analyzing the amount of government involvement necessary to raise constitutional issues, rejected the trial court's reasoning, noting that "[h]owever detailed this type of regulation may be in some particulars, it cannot be said to in any way *foster* or *encourage* racial discrimination."[22] (Emphasis supplied.) The Court held that only one regulation which had the effect of specifically requiring the club to discriminate was sufficiently involved with the private club's racially discriminatory policy to run afoul of the Constitution. None of the other regulations governing the operation of Moose Lodge were so entwined with the racial policies as to trigger the equal protection clause, because they did not

[19]387 U.S. at 381.

[20]407 U.S. 163 (1972).

[21]407 U.S. at 177.

[22]407 U.S. at 176-177.

specifically support the racial discrimination.[23] This distinction, which is of obvious importance, was stated by the Court as follows:

> The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever . . . . [S]uch a holding would utterly emasculate the distinction between private as distinguished from state conduct . . . . Our holdings indicate that where the impetus for the discrimination is private, the state must have "*significantly involved* itself with invidious discriminations" [citation omitted] in order for the discriminatory action to fall within the ambit of the constitutional prohibition. [Emphasis supplied.][24]

Thus, to summarize, while "to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an 'impossible task,' "[25] it is clear that governmental bodies cannot be "significantly involved" in discrimination. Such involvement has been found in the past where government "required" private parties to discriminate, "enforced" private discrimination, "authorized" private discrimination, or "fostered and encouraged" discrimination. Thus, the issue is whether a sufficiently close nexus is established between governmental action and actual discrimination by a private party; mere involvement

[23]407 U.S. at 177.

[24]407 U.S. at 173.

[25]*Burton* v. *Wilmington Parking Authority*, *supra*, 365 U.S. at 722.

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with a private party who discriminates is not enough. For the reasons set forth below, we conclude that there is no such nexus between the Board's certification and any discrimination undertaken by a union which has received such a certification.

We recognize, of course, that certification of a labor organization confers substantial benefits. The Board does not, however, by certifying a labor organization, place its imprimatur on all the organization's activity, lawful or otherwise. On the contrary, a certification is neither more nor less than an acknowledgement that a majority of the employees in an appropriate bargaining unit have selected the union as their exclusive bargaining representative.[26] The choice of representative is made by the employees, and may not be exercised by this Board:

> For, it must be remembered that, initially, the Board merely provides the machinery whereby the desires of the employees may be ascertained, and

[26]Of course, certification is based on recognition that the representative qualifies as a labor organization within the meaning of Sec. 2(5) of the Act. In this regard, we agree with the dissenters in *Bekins* that the majority in that case reached the anomalous result that a union may be a "labor organization" entitled to a place on the ballot and then, after the election, be "disqualified" from receiving certification on grounds that it practices invidious discrimination. This anomaly may have unfortunate consequences if the union wins the election, for, if a "disqualified" union is not a "labor organization" then the prohibitions of Sec. 8(b) do not apply to it. If the winning but "disqualified" union is a "labor organization," however, then the election is a valid one and, consequently, the employees will not only have been denied the right to be represented by their chosen bargaining agent but will also be denied the opportunity to vote for any representative for another year. 211 NLRB at 147-48, fn. 43.

> the employees may select a "good" labor organization, a "bad" labor organization, or no labor organization, it being presupposed that employees will intelligently exercise their right to select their bargaining representative.[27]

Clearly, certification does not constitute enforcement or even approval of a labor organization's activities, and should not be construed as "state action" restricted by the fifth amendment.

Indeed, a union's status as the bargaining representative gives it no right or authority to establish *hiring* restrictions based on membership restrictions whether or not such membership restrictions are legitimate for other purposes. For, under the Act, it is an unfair labor practice for a labor organization, whether or not it is certified, to cause or attempt to cause employers to hire on the basis of membership or nonmembership in a union. The Act further provides appropriate means to remedy such an unfair labor practice. Furthermore, a bargaining representative's right to enter into union-security agreements with employers conditioning continued employment on union membership or payment of agency shop fees is dependent on the availability of membership in the bargaining representative to any employees who choose to join. Similarly, if access to a union hiring hall is limited to union members, the exclusive hiring hall agreement violates the Act. Further, any membership policy of a union which would tend to limit job opportunities for minorities is barred by Title VII of the Civil Rights Act of 1964, as amended. Finally, the duty of fair representation[28] prevents unions from using

[27]*Alto Plastics Manufacturing Corporation*, 136 NLRB 850, 851 (1962).

[28]See discussion concerning the duty of fair representation, *infra*.

their bargaining representative powers in a discriminatory manner. Thus, while use of Board processes and the Board's certification may have helped a union gain the power of bargaining representative established by the Act, the union has not been authorized to discriminate in the exercise of those powers. The Act and the Board's implementation of it can hardly be said to be "significantly involved" in the union's discrimination, since the duty of fair representation in its various forms *specifically prohibits* a union from practicing unlawful discrimination under the authority of the Act. Therefore, the Board, while it may extend the Act's protection to the union, is not involved in the union's discriminatory activities, a requirement of the governmental action doctrine.

This view is buttressed by the indisputable fact that the Act predicates a union's bargaining representative status on its being chosen by a majority of the employees in the bargaining unit, not by the Board. Recognition of that status by the Board, through certification and/or a bargaining order, merely means that the Board is satisfied that a majority of the workers in the unit have chosen this union as their bargaining representative and that therefore the employer is statutorily required to bargain with it. The Board is substantially analogous in this respect to the Pennsylvania Liquor Control Board in the *Moose Lodge* case, about which the Court noted:

> Unlike the situation in *Public Utilities Comm.* v. *Pollak*, [citation omitted], where the regulatory agency had *affirmatively approved* the practice of the regulated entity after full investigation, the Pennsylvania Liquor Control Board has neither approved nor endorsed the *racially discriminatory practices* of Moose Lodge.[29] [Emphasis supplied.]

Indeed, the courts have found that an exclusive bargaining representative is subject to the duty of fair representation which prevents that union from using its position to unlawfully discriminate. The Congress has also taken steps to eliminate such discrimination based on race, etc., by enacting Title VII of the Civil Rights Act of 1964, as amended. Title VII, as implemented by the Equal Employment Opportunity Commission, performs the very function—using the same test for discrimination—which the Eighth Circuit Court of Appeals in *N.L.R.B.* v. *Mansion House Center Management Corporation*[30] would require of the Board.[31] The *Mansion House* court was thus not requiring the Government merely to meet constitutional requirements, but to meet them in a particular way which the court preferred to the method Congress has chosen. This view is supported by the Supreme Court's recent decision in *Washington, Mayor of Washington, D.C.* v. *Davis*,[32] in which the Court held that the standard for determining whether governmental action constitutes discrimination proscribed by the Constitution is not the same as the test to be utilized under Title VII.

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[29] *Moose Lodge, supra,* 407 U.S. at 175 fn. 3.

[30] 473 F. 2d 471 (C.A. 8, 1973). In that case, the court held that the remedial machinery of the Act could not be made available to a labor organization which engaged in unlawful racial discrimination.

[31] In fact, in supporting its test for racial discrimination in *Mansion House*, the court cited almost exclusively Title VII cases.

[32] 426 U.S. 229 (1976).

A logical consequence of the *Bekins* constitutional determination is the conclusion that in their respective areas of authority the Federal agencies have overlapping responsibility for remedying any invidious discrimination by private parties.[33] For example, one might argue that the Interstate Commerce Commission may not constitutionally approve a route of a common carrier which engages in discriminatory hiring practices or that the Securities and Exchange Commission is prohibited from approving a prospectus of a corporation which engages in such practices. This argument was recently rejected by the Supreme Court in *National Association for the Advancement of Colored People* v. *Federal Power Commission,*[34] in which the Court held that the FPC does not have the authority to promulgate rules prohibiting its regulatees from engaging in discriminatory employment practices, but that the Commission does have authority to consider the consequences of employment discrimination in performing its mandated regulatory functions. In that case, the Court discussed extensively the petitioner's argument that the references to the "public interest" in the Gas and Power Acts[35] authorized "if indeed it did

[33]The *Bekins* conclusion further implies that Congress does not have the power to vest jurisdiction over claims of racial or other invidious discrimination exclusively in a single agency, the Equal Employment Opportunity Commission. This conclusion is clearly wholly untenable. See 42 U. Chi. L. Rev. 1, 10 (1974).

[34]425 U.S. 662 (1976).

[35]See e.g., 16 U.S.C. §824(a): "the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest." Similarly, Sec. 1(b) of the National Labor Relations Act, as amended, refers to the policy of the Act to "define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare."

not require" the FPC to promulgate such rules. Rejecting this argument, the Court emphasized that it was necessary to look to the purposes of the Gas and Power Acts and:

> . . . that the principal purpose of those Acts was to encourage the orderly development of plentiful supplies of electricity and natural gas at reasonable prices. While there are undoubtedly other subsidiary purposes contained in these Acts, the parties point to nothing in the Acts or their legislative histories to indicate that the elimination of employment discrimination was one of the purposes that Congress had in mind when it enacted this legislation. The use of the words "public interest" in the Gas and Power Act is not a directive to the Commission to seek to eradicate discrimination, but, rather, is a charge to promote the orderly production of plentiful supplies of electric energy and natural gas at just and reasonable rates. [Footnotes omitted.][36]

Mr. Chief Justice Burger, in a concurring opinion, further stated:

> If Congress had mandated duplicative regulation, the result, however inefficient, would be none of our concern. But Congress did not do so. It centralized responsibility in the Equal Employment Opportunity Commission. To the extent that the *judiciary* orders administrative responsibility to be diffused, congressional intent is frustrated, regulated industries are subjected to the commands of different voices in the bureaucracy, and the agonizingly long administrative process grinds even

[36]425 U.S. at 669-670.

more slowly. To suggest, for example, that the FPC could deny a license on account of a regulatee's discriminatory employment practices . . . is to thrust the Commission into a complex, volatile area for which Congress has already assigned authority to the EEOC. [Emphasis in original.][37]

Furthermore, as Professor Meltzer of the University of Chicago has noted,[38] "An administrative agency generally does not have jurisdiction to invalidate important elements of its enabling legislation." In *Johnson, Administrator of Veterans' Affairs* v. *Robinson,*[39] Mr. Justice Brennan, speaking for the majority of the Court, quoted with approval Mr. Justice Harlan's concurring opinion in *Oestereich* v. *Selective Service System Local Board No. 11, Cheyenne, Wyoming,*[40] for the proposition that "[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies."[41] In our view, the *Bekins* majority ignored this principle. For, by concluding that "[t]o construe the mandatory language of the statute without reference to . . . constitutional issues would cause the statute itself to fall afoul of . . . constitutional limitations,"[42] the majority members in

[37]425 U.S., at 673-674.

[38]"The National Labor Relations Act and Racial Discrimination: The More Remedies, the Better?" 42 U. Chi. L. Rev. 1, 20, fn. 93 (1974).

[39]415 U.S. 361 (1974).

[40]393 U.S. 233, 242 (1968).

[41]415 U.S. at 368.

[42]211 NLRB at 139.

effect arrogated to this Board the power to determine the constitutionality of mandatory language in the Act we administer, a power that the Supreme Court has indicated we do not have. This view is further reinforced by the Supreme Court's recent decision in *Hudgens* v. *N.L.R.B.*[43] A majority of the Court there held that certain consumer picketing by a labor organization was not protected by the first amendment and that, therefore, the Act was the sole standard to be applied in determining whether or not the activity was protected. In this regard, the Court noted the following with respect to the Board's authority:

> Under the Act the task of the Board, subject to review by the courts, is to resolve conflicts between § 7 rights and private property rights, "and to seek a proper accomodation between the two." *Central Hardware Co.* v. *N.L.R.B.*, 407 U.S. 539, 543. What is "a proper accommodation" in any situation may largely depend upon the content and the context of the § 7 rights being asserted. The task of the Board and the reviewing courts under the Act, therefore, stands in conspicuous contrast to the duty of a court in applying the standards of the First Amendment, which requires "above all else" that expression must not be restricted by government "because of its message, its ideas, its subject matter, or its content."[44]

Issuance of a certification to a union which has won a fairly conducted valid election is mandated by the Act. As the dissenters in *Bekins* emphasized:

> Congress in Section 9(c)(1) directed that "[w]henever a petition has been filed in accordance

[43]424 U.S. 507 (1976).

[44]424 U.S. at 521.

with such regulations as may be prescribed by the Board . . . the Board *shall* investigate such petition and if it has reasonable cause to believe that a question concerning representation affecting commerce exists *shall* provide for an appropriate hearing. . . . If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and *shall* certify the results thereof." (Emphasis supplied.) This language is language of requirement. Absent unfairness in the election itself, the section commands the Board to issue a certification of representative to the winning labor organization. [Footnotes omitted.][45]

We conclude that the *Bekins* doctrine will significantly impair the national labor policy of facilitating collective bargaining, the enforcement of which is our primary function. First, the workers in the unit will be denied the "right guaranteed them by Section 7 of the Act to bargain collectively through representatives of their own choosing,"[46] which could be the only effective bargaining representative available to them.

Indeed, even a union which practices some unlawful discrimination may be the best one available in the opinion of the workers in the unit, who are given the right to decide for themselves by the Act. Even if minority members of the unit are convinced that the union will fairly represent them, and vote for the union under the *Bekins* approach, a bargaining order

[45]211 NLRB at 147.

[46]See *Bekins*, 211 NLRB at 148, dissenting opinion.

may still have to be denied.[47] Yet, the minority workers might not be helped by keeping the union out, since they will then be at the mercy of their employer who has no duty of fair representation to fulfill, who may act to the detriment of *all* the workers, and who may also discriminate against minorities. In short, a union that has discriminated actively in the past and still has a racial imbalance may be preferable for minority workers to no union at all. Second, employers faced with the prospect of unionization will be provided and have been provided under the Board's *Bekins* doctrine with an incentive to inject charges of union racial discrimination into Board certification and bargaining order proceedings as a delaying tactic in order to avoid collective bargaining altogether rather than to attack racial discrimination.

Not only does the *Bekins* approach impair the national labor policy favoring collective bargaining, but it is ineffective in implementing an antidiscrimination policy. Denying certification and bargaining orders to discriminating unions may seem to be an effective sanction as the status of bargaining representative is the source of a union's power. However, many unions have no need of Board aid to gain or keep the position of bargaining representative. Most unions do not resort to certification elections to establish their majority status, and many unions which are certified would not be harmed by losing their certifications. Entrenched unions, which already have well-established bargaining relationships with employers, need no aid

[47]In *Mansion House*, the one black member of the bargaining unit signed an authorization card. The Board thought this was significant, but the court ignored this fact. 473 F. 2d at 475.

from the Board in maintaining their positions. Powerful unions, which can make effective use of such traditional self-help remedies as striking and picketing to force employers to bargain, have no need for bargaining orders. These powerful and entrenched unions are the ones with the least natural incentive to lower racial barriers, because they do not have to worry about attracting votes at representation elections as the weaker unions must. Thus, the *Bekins* remedies fail to reach those unions likely to be the worst offenders. In addition, *Bekins*, by increasing the duration of representation cases, would create problems in applying Section 8(b)(7)(C) to picketing by unions whose representational eligibility is being litigated or has been denied by the Board. To prevent a union found ineligible for certification from engaging in representative status unavailable through the Board's usual representation case processes, and to prevent the prospect of a series of election petitions followed by recognitional picketing, the Board would be under pressure to disregard the literal language of Section 8(b)(7)(C) by making any recognitional picketing by an ineligible union a violation of that section.[48]

Also, under the majority *Bekins* holding, a labor organization could be denied certification upon the mere presumption that it will fail to discharge its responsibility to represent employees in *this* unit fairly solely because it has failed to represent employees fairly in some *other* bargaining unit, rather than on proof of such dereliction as to unit employees in a revocation proceeding. In fact, the Employer herein, in seeking to prevent the issuance of certification, relies upon discriminatory provisions in the Union's contracts

[48] *Bekins*, 211 NLRB at 147. fn. 43, dissenting opinion.

in other bargaining units with other employers, contracts to which this Employer has never been a party and which were found to be unlawful solely because they perpetuated the other employers' past discrimination. For the Board to conclude that there will be further unlawful conduct solely on the basis of such evidence is directly contrary to our longstanding policy. Traditionally, as is true of virtually all court and administrative determinations, the Board's findings and remedies apply only to the particular parties before us.

The *Bekins* holding further would lead to anomalous situations such as that where an employer exercises exclusive control over hiring, resulting in the total absence of female and black employees in the unit, yet it is argued that this situation constitutes evidence of the union's propensity to practice discrimination and certification of the union would perpetuate this condition. In these circumstances it would be ludicrous to excuse the employer from its bargaining obligation.

In the instant case, the Employer concedes that, in a bargaining unit comprised of 211 employees, 58 are black and 114 are Spanish-surnamed Americans. Inasmuch as the Union won the decertification election by a vote of 108 to 66, simple arithmetic establishes that a substantial percentage of the minority employees voted in favor of continued representation by the Union. This Union has represented these employees and, presumably, these employees would not have selected it again as their collective-bargaining agent had the Union previously discriminated against them or had they considered it likely that the Union would do so in the future.

Thus, the argument raised by the Employer here runs counter to our basic policy discussed above of

looking only at the conduct of the parties to our proceeding *vis-a-vis* each other.[49] Indeed, it appears that the Employer's purpose is to delay the onset of bargaining rather than to protect the minority or female employees from actual discrimination by the bargaining representative.

Questions concerning representation must be expeditiously resolved in order to achieve the statutory objective of fostering collective bargaining and assuring stability in labor-management relations. To that end, Congress chose to deny the parties judicial review of representation proceedings and to exempt such proceedings from the strictures of the Administrative Procedure Act.[50] For the same reason, representation questions are decided in nonadversary, factfinding proceedings. The overriding importance of allowing employees to decide as expeditiously as possible whether or not they desire a bargaining representative justifies elimination of these procedural safeguards in representation cases.

This is not to say that the Board will never consider such issues in representation proceedings. Rather, we have and will continue to consider the impact of unlawful discrimination where such consideration is required to preserve the integrity of the Board's own processes. Thus, the Board has long held that it would not apply its contract-bar rules so as to shield

[49]Even in cases where the Board has held, prior to an election, that a union was disqualified from representing employees, such finding has been predicated on the labor organization's conflict of interest with employees in the *specific* unit sought. *Harlem River Consumers Cooperative, Inc.*, 191 NLRB 314 (1971); *Bambury Fashions, Inc.*, 179 NLRB 447 (1969).

[50]*American Federation of Labor, et al.* v. *N.L.R.B.*, 308 U.S. 401, 409-411 (1940).

collective bargaining agreements which patently discriminate between black and white employees from the challenge of otherwise appropriate election petitions.[51] In reaching this conclusion, the Board specifically recognized that to hold otherwise would be inconsistent with the Supreme Court's condemnation of governmental sanctioning of racially separate grouping.[52] Similarly, in order to insure fairness in Board-conducted elections, the Board has held that an employer's preelection propaganda which constituted "a deliberate, sustained appeal to racial prejudice . . . created conditions which made impossible a reasoned choice of a bargaining representative." [53] The decision emphasized that "[t]he Board does not intend to tolerate as 'electoral proganda' appeals or arguments which can

[51]*Pioneer Bus Company, Inc.*, 140 NLRB 54 (1962).

[52]*Brown, et al.* v. *Board of Education of Topeka, et al.*, 349 U.S. 294 (1954); *Burton* v. *Wilmington Parking Authority, et al.*, 365 U.S. 715 (1961). We emphasize that *Pioneer Bus, supra*, is not statutorily mandated. Our contract-bar rules are wholly discretionary and, consequently, we need not recognize an existing collective bargaining agreement as a bar to an election where to do so would not contribute to the stability of labor relations but would have the reverse effect. See *The Pulitzer Publishing Company (Owner and Operator of Stations KSD and KSD-TV)*, 203 NLRB 639 (1973).

[53]*Sewell Manufacturing Company*, 138 NLRB 66, 70 (1962).

have no purpose except to inflame the racial feelings of voters in the election."[54]

It is thus apparent that the Board has considered, and will continue to consider, in representation proceedings the possible impact of clearly existing invidious discrimination within the unit at issue or of appeals to prejudice directed at employees in such unit in cases where an inquiry into these matters is necessary to protect the fairness of the election process.[55] However, because of the essentially non-adversary nature of representation proceedings, we believe that allegations of invidious discrimination should be considered in such proceedings *only* when required to fulfill our primary obligation of protecting employees from interference in exercising their right to select a bargaining representative.

It is thus apparent that issues involving alleged invidious discrimination by a labor organization should be considered in an adversary proceeding in which the accused union is accorded the full spectrum

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[54]138 NLRB at 71. See also *Glazers Wholesale Drug Company, Inc.*, 209 NLRB 1152 (1974), in which a majority of a Board panel concluded that an employer's comment that if the union was voted in "the blacks would take over" could be grounds for setting an election aside, although it was not a threat of employer action constituting a violation of Sec. 8(a)(1) of the Act. Also cf. *NLRB* v. *Staub Cleaners, Inc.*, 357 F. 2d 1 (C.A. 2, 1966) remanding 148 NLRB 278 (1964), Supplemental Decision and Order 171 NLRB 332 (1968), enf'd 418 F. 2d 1086 (C.A. 2, 1969).

[55]In these cases, however, the Board was not required to resolve factual disputes. Rather, each instance involved evaluation of uncontroverted facts as to possible impact on the election process.

of due process, including particularly the right of judicial review.[56]

This view accords with the basic premise of the Act that a determination that a party has engaged in unlawful conduct under Section 8 may only be made in an adversary proceeding initiated by a charge and followed by an investigation, issuance of a formal complaint, and litigation in a hearing before a duly qualified Administrative Law Judge. Such proceedings are at all stages subject to the Administrative Procedure Act and to review by Federal courts of appeals.[57] These procedures also accord with the basic

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[56]We agree with our concurring colleague that all fair representation claims must be adjudicated under Sec. 8(b) of the Act and not as a defense to an 8(a)(5) proceeding or in a representation proceeding.

[57]Our dissenting colleague disputes our view that under the *Bekins* approach a union which has been refused certification has very little opportunity to obtain judicial review of such action. He cites *Miami Newspaper Printing Pressmen's Union Local 46* v. *McCulloch*, 322 F. 2d 993 (C.A. D.C., 1963), for the proposition that such review is available for cases in which "the Board acts 'in excess of its delegated powers and contrary to a specific prohibition in the Act,' and when such action causes the 'depri[vation] . . . of a "right" assured . . . by Congress.' " 322 F. 2d at 994. Assuming that such review is available whenever application of the *Bekins* doctrine requires the withholding of a certification, it would be available only if, as we believe, that doctrine caused the Board to act "in excess of its delegated powers and contrary to a specific prohibition in the Act." Such review would not be available as to the factual finding that the union engaged in the disqualifying discrimination. Quite naturally, given our disagreement with our colleague as to the merits of the *Bekins* doctrine, we do not see how the availability of such limited review can be counted as an argument in favor of *Bekins*. Rather, we believe his observation and the case he cited in support helps to show the essential correctness of our views in the matter.

procedures required under Title VII, i.e., filing of a charge followed by investigation and, where required, a full court hearing on the merits.

Indeed, as Professor Meltzer observed with respect to the *Bekins* doctrine:

> In addition, the dissenters' approach would avoid the suspension of important rights on the basis of allegations, and thereby would serve the values of the NLRA, Title VII and our legal system generally. Indeed, it is one of the several ironies of *Bekins* that the Board will suspend an important right on the basis of allegations of Title VII violations, while a party charged under that title suffers no legal disability until there is a judicial finding upholding the charge.[58]

We conclude that our statutory function of eliminating invidious discrimination by labor organizations is best served by scrutinizing their activities when they are subject to our adversary procedures and remedial orders. Indeed, the Board has long utilized unfair labor practice procedures to consider allegations of invidious discrimination by labor organizations and employers which interfere with Section 7 rights. We have done so with respect to unions by policing their conduct *vis-a-vis* the employees in units they represent through our power to remedy a labor organization's breach of its duty of fair representation. This doctrine was first enunciated by the Board in *Miranda Fuel Company, Inc.*:[59]

[58]See *Meltzer, supra* at p. 24.

[59]140 NLRB 181 (1962).

> Section 7 thus gives employees the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment. This right of employees is a statutory limitation on statutory bargaining representatives, and we conclude that Section 8(b)(1)(A) of the Act accordingly prohibits labor organizations, when acting in a statutory representative capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair. [Footnote omitted.][60]

This doctrine of the duty of fair representation was derived from the Supreme Court's decision in three companion cases: *Steele* v. *Louisville & Nashville Railroad Co.*;[61] *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen;*[62] and *Wallace Corporation* v. *N.L.R.B.*[63] In *Steele* and *Tunstall,* both of which involved racial discrimination by a union which was statutory representative under the Railway Labor Act, the Court concluded that such a representative "cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft."[64] In

[60]140 NLRB at 185.

[61]323 U.S. 192 (1944).

[62]323 U.S. 210 (1944).

[63]323 U.S. 248 (1944).

[64]323 U.S. at 204. Our dissenting colleague states that "[i]n *Steele* v. *Louisville & Nashville Railroad Co.* . . . the Supreme Court made clear that the Constitution prohibited a labor organization, which was granted a statutory right to bargain exclusively for employees, from engaging in invidious discrimination in their representation." What the Supreme Court held in that case was that the Railway Labor Act imposed such a duty upon the statutory representative (at 202). Of course Justice Murphy, in his concurrence, expressed the view that such a duty was constitutionally mandated (at 209).

Wallace, which did not involve race discrimination, the Court held that the same duty of fair representation was required of bargaining representatives selected under the National Labor Relations Act.

The duty of fair representation has become the touchstone of the Board's concern with invidious discrimination by unions. For example, it is well established that a labor organization's rejection of an employee's grievance solely because of his or her race breaches the duty of fair representation and violates Section 8(b)(1)(A), 8(b)(2), and 8(b)(3) of the Act.[65] Similarly, we have held that a union's refusal to process grievances filed to protest an employer's segregated plant facilities constitutes a violation of Section 8(b)(1)(A).[66]

In *Galveston Maritime Association, Inc.*,[67] the Board held, again relying on the duty of fair representation, that a union's maintenance of a collective-bargaining agreement which allocated work on the basis of race violated Section 8(b)(1)(A), 8(b)(2), and 8(b)(3) of the Act. The Board premised the 8(b)(2) violation on its conclusion that the establishment, maintenance, and

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[65] *Independent Metal Workers Union, Local No. 1 (Hughes Tool Company)*, 147 NLRB 1573 (1964).

[66] *Local Union No. 12, United Rubber, Cork, Linoleum & Plastic Workers of America* AFL-CIO (*The Business League of Gadsden*), 150 NLRB 312 (1964), enf'd 368 F. 2d 12 (CA 5, 1966). The Board specifically noted that the union's refusal to process the grievances was based on its belief that discriminatory job conditions should continue and therefore held that the refusal to process a grievance on that ground violated the duty of fair representation.

[67] *Local 1397, International Longshoremen's Association*, AFL-CIO, *et al. (Galveston Maritime Association, Inc.)*, 148 NLRB 897 (1964), Member Fanning concurring.

enforcement of discriminatory work quotas based on irrelevant, invidious, and unfair considerations of race and union membership discriminated against employees in violation of Section 8(a)(3) of the Act and that, by causing an employer to so discriminate, a union violates Section 8(b)(2). In holding that the work allocation violated Section 8(b)(3), the Board concluded that "a labor organization's duty to bargain collectively includes the duty to represent fairly,"[68] on grounds that collective-bargaining agreements which discriminate invidiously are not lawful under the Act and therefore do not meet the good-faith requirements of Section 8(d).

The duty of fair representation is not limited to present discrimination, but is also breached by union policies which perpetuate past discrimination. Thus, in *Houston Maritime Association*,[69] the union had a policy prior to September 1963 of refusing to accept black applicants for membership. In the latter part of that month, the union adopted a policy of closing its register of applicants and refusing to accept any further applications regardless of the applicant's race. In addition to finding that the union's new policy violated Section 8(b)(1)(A) and Section 8(b)(2) of the Act as an attempt to perpetuate past discrimination, the Board found that the employers who had participated in the pattern of unlawful conduct had thereby violated Section 8(a)(1) and (3).

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[68] 148 NLRB at 899.

[69] *Houston Maritime Association, Inc. and Its Member Companies*, 168 NLRB 615 (1967).

While these cases clearly illustrate that we provide a remedy for breach of the duty of fair representation, thereby protecting employees from invidious discrimination by their bargaining representative, other remedies for a union's unlawful discrimination are also available. For example, we have held that a union commits unfair labor practices by attempting to force an employer to continue discriminatory practices even though no breach of the duty of fair representation is involved.[70] Additionally, the Board has, in appropriate cases, revoked the certification of unions which engage in unlawful invidious discrimination.[71]

As the foregoing discussion indicates, the Board has long recognized its obligation to consider issues concerning discrimination on the basis of race, sex, national origin, or other unlawful, invidious, or irrelevant reasons when they are raised in an appropriate context, and we shall continue to do so.[72]

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[70] *Local Union No. 2, of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (Astrove Plumbing and Heating Corp.)*, 152 NLRB 1093 (1965), wherein the Board held that a union violated Sec. 8(b)(2) and 8(b)(1)(A) of the Act by engaging in a walkout in order to protest an employer's attempt to remedy its past discrimination.

[71] *Independent Metal Workers Union, Local No. 1 (Hughes Tool Company), supra.*

[72] Member Fanning notes the dissent's observation in fn. 76 that "Member Fanning has not yet accepted *Miranda.*" This is superficially correct. He does not, for the reasons explained in *General Truck Drivers, Chauffeurs and Helpers Union Local No. 692, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Great Western Unifreight System)*, 209 NLRB 446 (1974). But, as he carefully explained in his concurring opinion in that decison, that does not mean that he—any more than the Board majority—sanctions or condones union misconduct towards employees. He has found violations of

However, on the basis of all the foregoing, although we neither approve nor condone discriminatory practices on the part of unions, we hereby overrule *Bekins* as we conclude that the holding of that case is neither mandated by the Constitution nor by the Act and is destructive of the policies embodied in Section 9(c) of the Act. We further conclude that issues such as those raised by the Employer herein are best considered in the context of appropriate unfair labor practice proceedings. We do so on the basis of the paramount importance of avoidance of delay in representation cases, the procedural safeguards afforded in unfair labor practice proceedings which are not available in representation proceedings, the somewhat different purposes served by Section 8 and Section 9 of the Act, and the fact that effective procedures already exist for litigation of the type of discrimination alleged by the Employer herein.

We therefore overrule the Employer's objection and shall certify the Union as the representative of the employees in the unit found appropriate above.

Sec. 8(b)(1)(A) in the maintenance of segregated locals, *Local No. 106, Glass Bottle Blowers Association*, AFL-CIO (*Owens-Illinois, Inc.,)* 210 NLRB 943 (1974), enfd. 520 F. 2d 693 (CA 6, 1975); and of Sec. 8(b)(1)(A) and 8(b)(2) in a union's coercive advocation and enforcement of racially discriminatory hiring policies, *International Brotherhood of Painters and Allied Trades, Local Union 1066*, AFL-CIO (*W. J. Siebenoller, Jr., Paint Company)*, 205 NLRB 651 (1973). He has, moreover, found breaches of the duty of fair representation be be violations of Sec. 8(b)(1)(A), *Truck Drivers, Oil Drivers and Filling Station and Platform Workers Local No. 705, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Associated Transport, Inc.)*, 209 NLRB 292 (1974); *Local 485, International Union of Electrical, Radio & Machine Workers*, AFL-CIO (*Automotive Plating Corp.*), 170 NLRB 1234 (1968).

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots have been cast for International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, General Drivers & Helpers Local Union No. 657, and that, pursuant to Section 9(a) of the National Labor Relations Act, as amended, the said labor organization is the exclusive representative of all the employees in the following appropriate unit found appropriate herein for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

> All warehouse employees, dock workers, truck drivers, sanitation drivers and helpers, shipping and receiving clerks, warehouse clerical employees, garage mechanics, fork lift and pallet jack maintenance employees and custodial employees employed at the Employer's grocery warehouse, produce warehouse, Harry Tappan Institutional Warehouse and meat products warehouse located in Bexar County, Texas, excluding all other employees including all maintenance and construction shop employees, poultry processing plant employees, bakery employees, office clerical employees, guards, watchmen and supervisors as defined in the Act.

MEMBER WALTHER, concurring:

I agree with my colleagues in the majority that the Employer's objection should be overruled. I agree also with their rationale for doing so to the extent that it is consistent with the views expressed below.

With respect to allegations pertaining to a union's breach of its duty of fair representation, not only do I

agree with my colleagues that such claims "should be" considered in an adversary proceeding, I think that they *must* be considered in such a proceeding. Assuming, as I do, that a proper accommodation between this Board and other governmental agencies (*e.g.*, EEOC) requires us to confine our examination to actual discrimination in the particular unit under consideration, fair representation claims are premature in both representation and 8(a)(5) certification-test proceedings—for in neither situation has the union yet been afforded an opportunity to represent the unit employees at all, fairly or unfairly. Such claims would, of necessity, have to relate to potential breaches of the duty of fair representation based upon conduct at other locations, an area of inquiry I would not entertain in any Board proceeding. For this reason, and for all of the due process safeguards attendant to our unfair labor practice proceedings mentioned by my colleagues, I conclude that all fair representation claims must be adjudicated under Section 8(b) of the Act.

My colleagues in the majority note that "we have and will continue to consider [in a representation proceeding] the impact of unlawful discrimination where such consideration is required to preserve the integrity of the Board's own processes." To the instances which they cite, I would add yet another: instances in which it can be established through reference to a petitioner's constitution, bylaws, or other written statement of policy, that the petitioner—not an affiliated organization or sister local—restricts access to membership on the basis of race, alienage, national origin, or sex. Should such discrimination be found, I would disqualify the petitioner from access to our

election machinery until it can establish that the offensive practices have been eliminated.

The proviso to Section 8(b)(1)(A), of course, prohibits litigation of membership discrimination claims in an unfair labor practice proceeding. I do not think, however, that the Board should ignore such blatant discrimination. Irrespective of whether we are constitutionally obligated to do so, I would, as a matter of discretion, deny a union which discriminates in this fashion access to our election machinery. In such instances, the discriminatory conduct is open, documented, and pervasive. The step which I recommend it seems to me is, in the words of the majority, "required to preserve the integrity of the Board's own processes."[73]

In the instant case, the Employer alleged discrimination both in the form of exclusionary membership policies and unfair representation. The evidence which was submitted, however, all related to matters falling within the realm of fair representation. No evidence was offered in support of the restrictive membership claim. In these circumstances, I agree with my colleagues that the Employer's objection should be overruled.

MEMBER JENKINS, dissenting:

On June 7, 1974, the Board in *Bekins Moving & Storage Co. of Florida, Inc.*, 211 NLRB 138 (1974), held that the due process clause of the fifth amendment precludes its certification as the exclusive

[73]Since the inquiry would determine the union's qualification to use election procedures, appropriate membership discrimination claims would have to be entertained at the outset of the representation procedure, prior to the direction of an election.

representative of unit employees of a labor organization which engages in invidious discrimination and that a precertification inquiry as to a labor organization's representation of employees on a nondiscriminatory basis is constitutionally required if the issue is timely raised. Two members of the Board dissented from this decision for the reason, among others, that any constitutional obligation of fair representation could be enforced after certification and that to delay certification for an inquiry into the labor organization's capacity for nondiscriminatory representation would provide "a procedure by which employers opposed to dealing with their employees collectively can delay and forestall the establishment of the collective-bargaining relationship." 211 NLRB at 148.

Experience of more than 2-1/2 years with the *Bekins* decision has provided no evidence of the delays which the dissenting members envisaged and which constituted a principal basis for their dissent. In the intervening years, however, the membership of the Board has changed and today a new majority holds that the due process clause of the fifth amendment does not preclude the Board from certifying as the statutory bargaining agent created by the National Labor Relations Act a union which engages in discriminatory representation, that the statute requires the certification of such a union if it is successful in an election, and that for policy reasons, as well as the statutory mandate, charges of discriminatory representation "are best considered in the context of appropriate unfair labor practice proceedings." Accordingly, it overrules the *Bekins* decision and forecloses any precertification inquiry into a union's discriminatory representation in the bargaining unit in issue. The Board majority in *Bekins*, of which I was a member, found that such certification "would appear to be

sanctioning, and indeed furthering, the continued practice of such discrimination, thereby running afoul of the due process clause of the fifth amendment." 211 at 139. Nothing has occurred since that decision to undermine the validity of this conclusion. I therefore vigorously disagree with today's contrary holding of my colleagues.[74]

In my colleagues' view the language of Section 9(c)(1) requires the Board to certify a union even though its governing instruments (constitution, charter, bylaws, etc.) exclude from its membership black or female employees in the unit or permit black or female employees in the unit to become members only of a segregated local.[75] As a result of the Board's certification, the employer is required to bargain with the Union as the exclusive representative of all employees in the unit, minority employees who voted against the union can have no other representation, the

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[74]In earlier decisions the Board has held, on constitutional grounds, that discriminatory practices by a union required the denial of representation privileges. *Independent Metal Workers Union, Local No. 1 (Huges Tool Company),* 147 NLRB 1573 (1964); *Pioneer Bus Company, Inc.,* 140 NLRB 54 (1962).

[75]I do not mean to suggest that the present case involves this situation, but the effect of the majority's decision is to require certification of such a union by precluding any precertification inquiry into a union's discriminatory practices. In the present case, the objection to certification included the claim that the union excluded "persons from membership on the basis of race, alienage or national origin." Local 657, which was the subject of the Employer's certification objection in this case, has been found accountable for discriminatory practices in establishing seniority rosters in its collective-bargaining agreements with three other employers engaged in similar business in this same area. *Rodriguez* v. *East Texas Motor Freight, supra*; *Herrera* v. *Yellow Freight Systems, Inc., supra; Resendis* v. *Lee Way Motor Feight, Inc., supra.*

Union's status as exclusive bargaining representative cannot be challenged for a year, and there is a presumption that its status as exclusive bargaining representative continues after a year. My colleagues acknowledge "that certification of a labor organization confers substantial benefits" but nevertheless assert that these benefits which flow directly from the Board's certification do not support a discriminating union in its invidious discrimination. They do not, and cannot, explain how assistance to the union in the exclusive representation of unit employees does not amount to assistance in the union's discrimination when that representation is conducted in accordance with the union's discriminatory practices. It is no answer that at some uncertain future date, after the union with Board assistance has carried out its discriminatory practices, unfair labor practice proceedings may be instituted which will bring these activities to a halt. The fact of the matter is that until that day comes, if it ever does come, the Board has fostered invidious discrimination by the statutory agent.

The decision of the Supreme Court leave no room for such Government-supported discrimination. In *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U.S. 192 (1944), the Supreme Court made clear that the Constitution prohibited a labor organization, which was granted a statutory right to bargain exclusively for employees, from engaging in invidious discrimination in their representation. The decisions of the supreme Court have repeatedly invalidated action taken by Federal or state agencies which have the effect of furthering, supporting, or assisting discrimination in any form. See, e.g., *Bolling* v. *Sharpe*, 347 U.S. 498 (1954); *Shelley* v. *Kraemer,* 334 U.S. 1 (1948); *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961).

Since the Board's certification grants a discriminating union the right of exclusive representation, together with various concomitant advantages, it seems that my colleagues close their eyes to the facts when they assert that certification does not assist a discriminating union in its discriminatory practices. As the Court stated in *N.L.R.B.* v. *Mansion House Center Management Corporation,* 473 F. 2d 471, 477 (CA 8, 1973), "Federal complicity through recognition of a discriminating union serves not only to condone the discrimination, but in effect legitimizes and perpetuates such invidious practices. Certainly such a degree of federal participation in the maintenance of racially discriminatory practices violates basic constitutional tenets."

In an attempt to rationalize their conclusion that the due process clause of the fifth amendment does not prohibit the Board's certification of a discriminating union, my colleagues assert that the view of the majority in *Bekins* that certification of a discriminating union violates constitutional restrictions misconstrued the Supreme Court delineation of the scope of prohibited state action. After reviewing a number of cases in which the Supreme Court held state action involved with invidious discrimination exceeded constitutional bounds, my colleagues state that such an involvement is found in circumstances, among others, where the Government authorized private discrimination or fostered and encouraged private discrimination. They conclude, however, that certification of a discriminating union does not sufficiently involve the Board in the union's invidiously discriminatory practices to render its action unconstitutional because "a certification is neither more nor less than an acknowledgment that a majority of the employees in

an appropriate bargaining unit have selected the union as their exclusive bargaining representative" and does not authorize the union to engage in discrimination.

This evaluation of the Board's involvement in the union's discriminatory practices is a patent understatement of the significant effects of certification. By certification the union becomes the statutory bargaining agent with statutory rights. Improper interference with the selection of the bargaining representative is the violation of "public, not private, rights." *Virginia Electric & Power Co.* v. *N.L.R.B.,* 319 U.S. 533, 543 (1943). The usual form of certification of representative provides that the "labor organization is the exclusive representative of all the employees in the . . . appropriate unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." The invidious discrimination of a discriminating union is practiced in the very areas to which the certification of a union relates. As previously noted, certification of a union confers the exclusive right to represent all employees in the bargaining unit, the right to be free from challenge for a year, and a presumption that its majority status continues after a year. Without the Board's certification a labor organization does not enjoy the rights of a statutory bargaining agent. Obviously, a union's status as the statutory bargaining agent enhances its position with respect to both the employer and the unit employees. By certifying a union which excludes blacks or women from membership or segregates them in a separate local, the Board directs the employer to bargain exclusively with this discriminating union as representative of the excluded or segregated blacks or women. Minorities do not have a protected right, separate from the certified representative, to engage in concerted activities to protest

discrimination by their employer. *Emporium Capwell Co.* v. *Western Addition Community Organization,* 420 U.S. 50 (1975). Certification is thus an integral part of the representation function in which the union practices discrimination and is patently direct participation and assistance by a Government agency, contrary to constitutional strictures, in the union's discriminatory representation. Accordingly, "[w]here a governmental agency recognizes such a union to be the bargaining representative it significantly becomes a willing participant in the union's discriminatory practices." *Mansion House, supra,* 473 F. 2d at 473. The Board's conferring the status of statutory bargaining agent upon a union which engages in invidious discrimination clearly fosters and supports the union's discriminatory practices and this constitutes the Board's involvement in them under the standards which my colleagues acknowledge but contend are not applicable here. As the Supreme Court stated in *Burton* v. *Wilmington Parking Authority, supra,* where the state authority merely leased space in a public building to a private restaurant which denied service to blacks, there existed "that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn."

The Board's decisions holding breach of the duty of fair representation to be an unfair labor practice, with which I of course fully agree, are no substitute for the disqualification of a discriminating union in a representation proceeding.The fifth amendment does not permit a Government agency to provide the instrument for practicing discrimination merely because at some uncertain future date the Board may have an opportunity to terminate this discrimination in unfair labor practice proceedings set in motion by the charges

of private parties if the General Counsel decides to file a complaint. The Board cannot initiate unfair labor practice proceedings. Moreover, for a variety of reasons, such proceedings may never be instituted notwithstanding the discriminatory exclusion of minorities from the union or from employment in the certified unit.

The effect of a union's exclusion of blacks or women from membership or their segregation in separate locals may discourage them from seeking or retaining employment with an employer who is compelled by the Board's certification to bargain exclusively with the discriminating union. An employer confronted with a certification may find it expedient to enter into a collective-bargaining agreement wiith a union which excludes blacks or women from employment. In these situations, the possibility of invidious discrimination being raised as an unfair labor practice is minimized or eliminated. The certification of the Board thus serves as an instrument for the perpetuation of invidious discriminatory practices. It is clear to me, therefore, that the due process clause of the fifth amendment requires that certification be denied whenever the evidence establishes that the labor organization's representation in the unit for which it requests certification will be infected with invidious discrimination.

My colleagues contend that certification of a union successful in an election is mandatory under the Act and that an administrative agency cannot pass upon the constitutionality of a statute whose obligation it is the agency's to administer. This argument is completely

devoid of mert.[76] Certainly an agency is not holding a statute unconstitutional when it decides to administer it in a constitutional manner. Direct commands in a statute are impliedly made subject to constitutional limitations. My colleagues would meet the problem of eliminating invidious discrimination by labor organizations through its power in unfair labor practice proceedings to remedy the union's breach of its duty of fair representation. But the National Labor Relations Act nowhere expressly imposes on the statutory bargaining agent a duty of fair representation. This doctrine, first enunciated by the Board in *Miranda Fuel Company, Inc.*, 140 NLRB 181 (1962), as my colleagues acknowldge,[77] was derived from the Supreme Court's decision in *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U.S. 192 (1944); *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210 (1944); and *Wallace Corporation* v. *N.L.R.B.*, 323 U.S. 248 (1944). In these cases the Supreme Court held that a statutory duty of fair representation by the exclusive bargaining representative must be implied for constitutional reasons. Thus, in attacking the problem of invidious discrimination by reading into the statute a duty of fair representation,

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[76]In *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U.S. at 198, the Supreme Court held that if a statute confers on a statutory .bargaining representative the right to discrimmate against members of the bargaining unit

> . . . constitutional questions arise. For the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights.

[77]Member Fanning has not yet accepted *Miranda*.

my colleagues rely no less on constitutional requirements than they would if they held nondiscrimination to be a condition to certification. Similarly, in *Pioneer Bus Company, Inc.*, 140 NLRB 54 (1962), the Board took account of constitutional requirements in denying the benefits of its contract-bar doctrine to a discriminating union. And in *Independent Metal Workers Union, Local No. 1 (Hughes Tool Company)*, 147 NLRB 1573 (1964), the Board relied on constitutional doctrine for its holding that racial segregation in membership by a statutory bargaining representative cannot be countenanced by a Federal agency. *Miranda, Pioneer Bus,* and *Hughes Tool* are relied on approvingly by my colleagues. It is clear that the Board is required to interpret and apply the Act in a manner which will avoid offense to the Constitution and that in doing so it is not adjudicating the constitutionality of congressional enactments.

My colleagues' decision does further violence to constitutional doctrine in its suggestion that a discriminating union which wins an election should be certified because it may be preferred by minority employees as better than no union at all. The majority does not indicate how the minority employees' preference in this respect would be ascertained. Moreover, as to a discriminating union's being preferable to none at all, it might just as readily be claimed that segregated school systems should have been upheld because they were better than none at all and a state might refuse to support a desegregated system. The effect of my colleagues' position is that the Board can properly assist in the perpetuation of discriminatory representation because such representation might be preferred to no representation. No authority is cited for this bizarre suggestion and I am certain none can be found.

The constitutional impediment to certification of a discriminating union forecloses consideration of policy reasons for adopting a procedure which grants certification and postpones determination of disqualifying discrimination to a later date. But even if there were no such impediment, I find to be singularly lacking in substance the reasons advanced by my colleagues for postponing until after certification the determination of invidious discrimination questions. The principal concerns of my colleagues appear to be that employers will seize upon the opportunity to raise questions of discrimination as a device for delaying certification and collective bargaining, that they will present evidence of discrimination of a character that does not establish that the particular local involved will engage in discrimination in the unit for which certification is sought, and that in the certification stage there is no opportunity for an adversary hearing which will permit the question of discrimination to be determined properly.

In attempted support of their argument that employers will use objections to certification based on discrimination as a tool for delaying or avoiding collective bargaining, my colleagues cite as illustrations cases in which the evidence of a labor organization's discriminatory conduct fell far short of establishing that it would engage in discrimination in the unit for which certification was currently being sought. If there is a propensity for employers to submit inadequate evidence of discrimination in support of an objection to certification, this is hardly relevant to the question whether certification should be denied when conclusive evidence of such discrimination is presented. I agree with my colleagues that disqualifying evidence of discrimination must relate to the union's future course

of conduct in the unit involved in the representation proceeding and must do more than provide a basis for speculation as to the union's conduct as the certified bargaining representative. My colleagues apparently assume that it is impossible to prove disqualifying discrimination before certification. But certainly where a union's governing instruments require it to exclude minorities from membership or segregate them in separate locals in the unit for which certification is sought, there is irrebuttable evidence of invidious discrimination. What lesser evidence will satisfy the Board is a matter for case-by-case determination. To hold, as my colleagues do, that because some evidence will be insufficient no evidence will be permitted, is a perversion of the administrative process. Nor can it be persuasively maintained that the mere opportunity to present inadequate evidence of discrimination will unduly delay the bargaining process. The more than 2-1/2 years' experience with the *Bekins* decision has shown that our Regional Offices and the Board itself have been able to deal expeditiously with spurious objections to certification based on alleged discrimination, and that no undue delays have occurred. See, e.g., *Grants Furniture Plaza, Inc. of West Palm Beach, Fla.*, 213 NLRB 410 (1974).[78]

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[78]In *Grants*, the Board adopted the Regional Director's recommendation that the employer's objection to certification on the ground that the union was guilty of discriminatory practices be overruled without a hearing. The Board held that statistical evidence of the composition of the union's membership without evidence of who controlled hiring practices and evidence that a complaint had been filed by the Department of Justice alleging discrimination were not sufficient to warrant a hearing and certified the union.

My colleagues further claim that determination of an invidious discrimination objection should be made in an adversary proceeding which is not available during the representation stage of a case. This is clearly in error. If a genuine issue of discrimination is presented as an objection to certification after an election, the procedure contemplated by *Bekins* would be to designate a Hearing Officer to conduct a hearing on the question of discrimination and any other objections to the election which involved genuine issues of fact. At this hearing all interested parties would have an opportunity to present evidence, cross-examine witnesses, submit briefs, and, if desired, to participate in oral argument. After the Hearing Officer files his report and recommendations, the parties may file exceptions and briefs with the Board after consideration of which the Board will render its decision. If certification is granted, the employer may obtain judicial review in a court of appeals after the summary judgment finding of an 8(a)(5) violation based upon its refusal to bargain. *May Department Stores Co. d/b/a Famous-Barr Co.* v. *N.L.R.B.*, 326 U.S. 376 (1945). If certification is denied, a union may obtain judicial review by means of an independent action in a United States District Court. *Miami Newspaper Printing Pressman's Union Local 46* v. *McCulloch*, 322 F. 2d 993 (C.A.D.C., 1963). These opportunities for hearing and review are obviously adversary in character (see *Miami Newspaper case*, *supra* at 998) and meet all the requirements of due process.

To conclude, the *Bekins* decision properly holds that certification of a discriminating union supports and involves a Government agency in the discrimination in

violation of the due process clause of the fifth amendment. Policy arguments are, accordingly, irrelevant but, in any event, those advanced by my colleagues are entirely speculative and not supported by experience under the Act. I therefore consider the overruling of *Bekins* to constitute clear legal error.

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